

PENDING OIL SPILL LEGISLATION

HEARING
BEFORE THE
SUBCOMMITTEE ON
ENVIRONMENTAL PROTECTION
OF THE
COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
ONE HUNDRED FIRST CONGRESS
FIRST SESSION
ON
S. 686, S. 687, S. 1066, AND S. 1223

JULY 21, 1989

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(II)

CONTENTS

OPENING STATEMENTS

	Page
Baucus, Hon. Max, U.S. Senator from the State of Montana	1
Chafee, Hon. John H., U.S. Senator from the State of Rhode Island	2
Graham, Hon. Bob, U.S. Senator from the State of Florida	4
Lautenberg, Hon. Frank R., U.S. Senator from the State of New Jersey	27
Lieberman, Hon. Joseph I., U.S. Senator from the State of Connecticut	5
Mitchell, Hon. George J., U.S. Senator from the State of Maine	3
Reid, Hon. Harry, U.S. Senator from the State of Nevada	5

WITNESSES

Baily, Douglas B., Attorney General, State of Alaska	34
Written statement	86, 89
Catena, John, science policy analyst, The Oceanic Society	61
Written statement	162
DiBona, Charles J., president, American Petroleum Institute	53
Written statement	141
Dickerson, Kenneth R., vice president, Atlantic Richfield Co	49
Written statement	112
Eikenberry, Kenneth O., Attorney General, State of Washington	35
Written statement	91
Farrell, Joseph, president, American Waterways Operators	51
Written statement	120
James, Thomas, general counsel, Louisiana Offshore Oil Port	52
Written statement	130
Jorling, Thomas C., Commissioner, New York State Department of Environ- mental Conservation	43
Written statement	103
Kelso, Dennis, Commissioner, Alaska Department of Environmental Conser- vation	41
Written statement	100
Sheldon, Karin, senior counsel, The Wilderness Society	60
Written statement	149, 155
Skinner, Hon. Samuel K., Secretary, Department of Transportation	7
Written statement	65
Tierney, James E., Attorney General, State of Maine	32
Written statement	77
National Association of Attorneys General, resolution of	85

ADDITIONAL MATERIAL

Bills:	
S. 686	183
S. 687	224
S. 1066	227
S. 1223	304
O'Neil, James E., Attorney General, State of Rhode Island, letter to Senator Mitchell	25
Van de Kamp, John K., Attorney General, State of California, statement of	177

PENDING OIL SPILL LEGISLATION

FRIDAY, JULY 21, 1989

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:54 a.m., in room 406, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the subcommittee) presiding.

Present: Senators Baucus, Mitchell, Graham, Lautenberg, Lieberman, Chafee, Jeffords, and Durenberger.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Good morning. The subcommittee will come to order.

The Subcommittee on Environmental Protection convenes today to consider oil spill legislation which I and Senator Chafee, Senator Mitchell, Senator Lieberman, Senator Lautenberg, and other members have introduced. The bills pending before us address the key issues of oil spill prevention, cleanup, and compensation.

It is my intention, and I believe that Senator Chafee shares my view, that the subcommittee put together a single comprehensive bill that combines the best features of all our respective proposals and that incorporates other worthwhile ideas. Any comprehensive bill put together by this subcommittee should encourage greater industry efforts to prevent oil spills. I believe that means tougher penalties, particularly for those that pollute or refuse to clean up. It means allowing States to retain and enact unlimited liability laws. And it means encouraging research on prevention techniques.

A comprehensive bill must try to ensure that industry and Government are prepared for oil spills, and that they respond promptly and effectively to contain them, and minimize damages. To be ready and able to remove spills quickly, we need to clarify Federal cleanup responsibilities and set up well-equipped regional oil spill response teams. We need to require industry to prepare contingency plans for its ships and facilities that meet tough standards. And we must make sure that the industry have the equipment and trained personnel where they're needed and when they're needed to contain cleanup spills without delay.

Finally, a comprehensive bill within this committee's jurisdiction must ensure that Federal agencies, States, and citizens are all compensated for cleanup costs and damages from oil spills. To pay for these costs we need a Federal fund, financed by the industry, to

pay for spills where the polluter cannot be found, isn't able to pay, or where liability limits have been reached.

As I indicated that the end of the oil spill hearing a week ago, I expect and hope that the subcommittee will develop a single comprehensive oil spill bill, along the lines I've laid out for consideration by the full committee prior to the start of the August recess.

I'll now turn to the Senator from Rhode Island, Senator Chafee.

**OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR
FROM THE STATE OF RHODE ISLAND**

Senator CHAFEE. Thank you very much, Mr. Chairman. First, I want to thank you for holding this hearing on the various legislative proposals that have been presented to this committee.

We've heard a great deal of testimony over the past several weeks in connection with oil spills. And clearly, these spills have posed a terrible threat to our environment. Sometimes it's been more than a threat, sometimes the damage has actually been done. Look at Prince William Sound, for example, where after all these months the cleanup is far from complete.

In my own State recently we dodged a bullet, but it was due to some favorable circumstances. First, the Coast Guard did a splendid job. Secondly, the weather conditions were in our favor. What the long-term ecological harm will be to our State, remains to be seen.

There's been a common theme to the testimony we've heard. We need to enact drastic improvements to the laws governing oil spill response and prevention. There's a good deal of support for establishing a substantial fund to provide immediate financing for oil spill response, and to compensate those suffering economic loss from the spills.

We have two bills that we're going to hear testimony on today, one introduced by the very able Majority Leader, who's been so active in this area for many, many years, and another introduced by me on behalf of the Administration, both to establish cleanup funds.

We're going to also hear testimony pro and con on implementing the Protocols which would allow U.S. access to the international oil spill compensation fund. Ratification of these Protocols is obviously controversial, because in order to do so we'd have to preempt the State liability laws.

Mr. Chairman, I look forward to this testimony, and again want to thank you. I agree with the schedule you've outlined. I think we ought to mark this up, get it out, and to the Floor prior to the August recess. Now that's a tough schedule to meet with everything else that's going on around this place. But I want to pledge cooperation from this side in your efforts to achieve that goal.

Senator BAUCUS. Thank you, Senator.

Senator Mitchell.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S.
SENATOR FROM THE STATE OF MAINE

Senator MITCHELL. Mr. Chairman, thank you very much for holding this hearing and for outlining the schedule for action on this matter, which I strongly support.

It's imperative that we act. The recent epidemic of oil spills demonstrate that tankers transporting oil are not operating safely enough. Federal legislation must assure greater safety and more effective emergency response. While the current law provides authority for complete and effective contingency planning, it is apparent that these provisions have not been vigorously implemented. We must do more. Prevention is the best response. We must, of course, prepare for the worst, but safe shipping is the first responsible answer.

Obviously, spills will occur. When they do, they require swift and effective action to minimize their adverse effects. The Clean Water Act provides authority for such action. However, to be effective, such authority must be properly exercised. In the case of the *Exxon Valdez*, valuable time was lost. There should have been a swift and decisive response by the President in the hours and days immediately following the accident. Unfortunately, there was no such response. The President chose not to use the power available to him to take over the cleanup effort. The legislation I've introduced amends the Clean Water Act to require the President to take action unless the President finds that the vessel owner, or operator, will promptly and properly cleanup the spill, and has the ability to do so.

I'm concerned about the status of our laws to protect the environment and the devastation caused by oil spills. For eight years I've worked for comprehensive Federal oil spill legislation that does not preempt State laws. The last time an oil spill bill passed the Senate was in 1986. I introduced that bill. It was not preemptive. For years the Administration and the House have insisted on legislation that preempts State laws. While I'm interested in reasonable accommodation, I will strongly oppose Federal legislation that preempts State oil spill liability laws, or State compensation funds, including ratification of the Protocols. There will be no Federal legislation that preempts State laws.

The Alaska spill is, in my judgment, conclusive evidence against preempting State law. The Federal law governing the spill in Alaska is the TransAlaska Pipeline Authorization Act. That Act limits compensation to \$100 million. Senator Stevens commented in testimony before this committee, last March, that he believed cleanup and damage costs could reach \$1 billion. The TransAlaska Act does not preempt State law. The only way the citizens of Alaska have any hope of being fully compensated for their losses, is under the Alaska State statute, which provides for unlimited, strict, joint and several liability. Had the Protocols, or preemptive Federal legislation been in place, Alaskans would have been unable to seek full recovery of their losses. It is inconceivable to me that in the wake of the Alaskan oil spill anyone would want to preempt all State oil spill laws.

I'm also persuaded that the \$500 million per incident limit on liability is clearly outdated. I will propose that the committee amend S. 686 to either increase the per incident limit to \$1 billion, or remove the limit on compensation all together. Compensation is limited by the amount of damage. I'm not persuaded that any limitation is necessary, serving only to limit the ability of victims to recover.

I look forward to hearing from our witnesses today on this important environmental issue, and I'm very grateful to you, Mr. Chairman, for scheduling this hearing.

Senator BAUCUS. Thank you very much. Your presence here is certainly not lost upon this committee. You are, and have been, an ardent student of the intricacies of Federal/State relations regarding oil spill liability. You have worked diligently to secure the passage of much more meaningful legislation than we presently have under current law, and you taking the time to come here this morning to be directly a part of this hearing is very important to this subcommittee, and your effort, your presence, and your involvement certainly will not be lost on this committee. And I appreciate you taking the time to come and participate in this hearing.

The subcommittee will now temporarily recess.

[Recess.]

Senator BAUCUS. The Chair now recognizes Senator Graham of Florida.

OPENING STATEMENT OF HON. BOB GRAHAM, U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Thank you, Mr. Chairman. I wish to also commend you for holding these hearings. I do not have a prepared opening statement, but I would like to bring to the committee's attention an aspect of this legislation which relates to the Outer Continental Shelf.

The same issues of prevention, appropriate response, and compensation that we are focusing on as it relates to oil spills in transport have the same potential as it relates to oil spills from an Outer Continental Shelf facility. There was some extremely disturbing information provided recently, which in summary was that in the last five years there have been some 16,000 citations for either safety or environmental shortfalls in Outer Continental Shelf facilities. There have been zero civil citations or fines as a result of those 16,000. The Department of Interior has stated that the reason for this nonenforcement is a defect in the current law as interpreted by our Federal Courts.

I would suggest, Mr. Chairman, as part of this comprehensive look at oil spill prevention, response and compensation, that we might examine that defect, and in the course of this comprehensive legislation also take what remedial action is necessary there.

Senator BAUCUS. Thank you, Senator. Good suggestion.

Senator Reid.

**OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR
FROM THE STATE OF NEVADA**

Senator REID. Mr. Chairman, thank you very much.

The Finance Committee has had a number of hearings regarding oil spills in which I participated. The oil spill bill that I have introduced there would prevent income tax deductions unless certain conditions were met.

As I've indicated, we've had a hearing on this before Senator Bentsen's committee. I think it's important that we recognize the need for legislation. I certainly compliment this subcommittee for going forward. The legislation before this subcommittee will look at a number of areas that need review, whether there should be a strict liability system; whether there should be an expansion of a class of parties responsible for oil spills; whether there should be a more definitive range of monetary and criminal penalties. It's clear that the present law is vague, unwieldy and unfair.

As usual, Mr. Chairman, the staff has done an outstanding job in preparing us for this hearing. I think it's important to note that the statutes that are in existence now could allow a badly damaged vessel, worth very little, to be the shipowner's entire extent of liability. I would like to read a portion from a May, 1989 decision of the Ninth Circuit Court which is in the Western part of the United States; the judge wrote:

Shortly after the close of the middle ages, many European seafaring nationals developed a rule of maritime law that limited a shipowner's liability to the value of the vessel and it's cargo. The rule was first adopted in the United States in the Limitation of Liability Act of 1951, and has remained part of U.S. law today. A vestige of a time-gone by.

He goes on to say:

No one who has had occasion to study the Act has been struck by its lucidity. Misshapen from the start, subject of later encrustations, arthritic with age, the Limitation Act has provided the setting for judicial lawmaking seldom equalled. This is an area that could profit from modern legislative attention. Congress might be well advised to examine other approaches. . . .

Certainly, Mr. Chairman, this is an area of law that we must be involved in. We must recognize that the law that is now in operation is, as the judge said, antiquated and arthritic. So, I think the schedule that you have set, even though it's bold, is one that we should try to stick to, because certainly the American public deserves this protection.

Senator BAUCUS. Thank you, Senator.

**OPENING STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S.
SENATOR FROM THE STATE OF CONNECTICUT**

Senator LIEBERMAN. Thank you, Mr. Chairman.

I regret that I cannot stay this morning for this hearing, thanks to the appointment that the Majority Leader has given me to be on the Hastings Impeachment Panel.

But I did want to stop by, and I do have a statement which I'd ask be entered into the record.

Senator BAUCUS. No objection.

Senator LIEBERMAN. I would just very briefly say this week the State of Alaska actually completed its report on the *Exxon Valdez* spill, and the report concluded:

There were simply arrogant and complacent people at the top levels of Exxon Shipping Company, and Alyeska Service Company, who did not pay attention to their responsibilities.

That conclusion is essentially consistent with the conclusion that Secretary Skinner and Administrator Reilly reached in their report to the President a while back. Mr. Chairman, it seems to me that one way to get people to pay more attention to their responsibilities is to toughen the penalties that the law imposes on them.

We have before us in this committee, under your leadership, some bills that will do just that. That's a lesson that I learned during my time as Attorney General of the State of Connecticut, and I must say that I'm glad finally to welcome to this hearing two of my former colleagues, Attorney General Jim Tierney of Maine, who I gather taught the Majority Leader much of what he knows about American Government—

Senator MITCHELL. And politics.

Senator LIEBERMAN. And politics, right. And my dear friend, one of the great talents in American Government, Attorney General Ken Eikenberry, of the State of Washington, is now the Vice President of the National Association of Attorneys General, and a real leader in environmental matters. And Attorney General Doug Baily of Alaska, whom I did not have the honor of serving with, but who I know is an outstanding public servant.

I'm sorry that I won't be here to hear them, but I believe that their testimony will be of great help to this committee in fashioning legal expressions of the outrage of society when the environment is despoiled by oil spills. And also in dealing effectively with the point that the Majority Leader has addressed so well, which is the importance of maintaining the prerogative of State governments to protect their people and their environment as they see fit.

Thank you, Mr. Chairman.

[Senator Lieberman's statement follows:]

OPENING STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE STATE OF CONNECTICUT

Thank you Mr. Chairman for holding this hearing to review the legislative proposals now before this Committee governing liability and compensation for oil spills.

This week the state of Alaska completed its report on the Exxon Valdez spill. The report concluded and I quote:

"There were simply arrogant and complacent people at the top levels of Exxon Shipping Co. and Alyeska Pipeline Service Co. who did not pay attention to their responsibilities."

This conclusion is right in line with the report on the Exxon disaster submitted by EPA Administrator Reilly and Secretary of Transportation Skinner to the President last month. For example, Exxon's plan for cleanup of spills in the waters of the U.S. from Exxon vessels, including the spill from the Valdez, had no details. It contained no information which related in any way to the Prince William Sound or the Valdez Terminal. It had no equipment list other than mention of a van and sampling equipment. It did not even discuss the use of booms, skimmers and dispersants. In short, it was entirely a paper exercise bearing no relationship to reality.

The plan prepared by Alyeska Pipeline Transit Company was equally surreal. For example, the plan relied on the use of dispersants for cleanup of a spill in Prince William Sound. At the same time, the plan stated that it would be difficult to apply dispersants effectively because the necessary equipment was in Arizona.

The Reilly-Skinner report to the President gets worse. The person in charge of cleanup for Alyeska simply decided it was not necessary to accompany the Coast Guard to the scene of the spill because the plan didn't require it. The arrival of vital equipment was delayed precious days during the early part of the spill. Training of workers did not take place until after the spill had occurred.

From my experience as Attorney General of Connecticut, I know one way to ensure that companies will act in a manner which protects our environment is to have laws which clearly spell out the consequences of their failure to do so. It is clear that our current laws did little to compel Exxon to prepare for an oil spill, nor did they compel Exxon to act reasonably once a spill occurred.

To add insult to injury under our current system of laws Exxon's liability for cleanup costs and penalties is limited. And the authority of the government to force polluters to clean up their mess is extremely limited. The disaster thus leaves us not with one mess to clean up, but two: the one in the water and the one on the books—in the laws and contingency plans that failed us and that may prevent us from adequately protecting Alaska's environment and exacting the kind of justice the American public demands.

In the wake of the Exxon disaster, I along with Senators Chafee, Durenberger, Reid and Cranston introduced legislation, S. 1223, designed to complement S. 686 and to close some serious loopholes that hamper the cleanup of oil spilled into our waterways.

The legislation we have proposed adopts the following concepts:

First, the polluter must pay fully for the mess it created—for cleanup costs, natural resource damages and economic losses to individuals. Simply put, this is a principle which is one of the basic building blocks of our system of justice.

Second, the "polluter" must be defined to include all parties related to the spilled oil—the person or company which arranged for the transport of the oil, the transporter of the oil, those who own an interest in the oil, the owner of the vessel and the operator of the vessel. And all these entities must be strictly and jointly and severally liable.

Those who traffic in hazardous substances, including oil transported in million-gallon tankers through pristine waters, are often in the best position to insure that the risks associated with their position to insure that the risks associated with their activities are minimized. They will exercise the maximum degree of care about their activities if they know that the exposure to liability is from their own pockets and cannot always be spread throughout the oil production and transport industry.

Third, the polluter should be subject to high civil and criminal penalties, where appropriate, for violating the provisions of the Clean Water Act.

Fourth, the government must have the authority to go to court or issue administrative orders to compel a company to conduct a clean up, if the government determines that the company is responsible and can properly perform the work. If a company fails to do what the government demands, there should be stiff penalties. S. 1223, which is modeled after the Superfund provisions, provides the government with this injunctive authority and allows the government to assess penalties and treble damages if the polluter fails to comply with an order.

There is, of course, no assurance that any legislation we enact will guarantee that corporations exercise the highest degree of care possible. But I was very heartened to read the following excerpt from Administrator Reilly's recent report to Congress on the Superfund program, which contains the strongest liability scheme in our Federal environmental laws:

"The Superfund liability standard has also provided a powerful incentive for businesses, Federal facilities, and local governments to properly manage their wastes. Additionally, the threat of potential Superfund liability has spurred businesses, particularly during property transfers, to conduct environmental audits and remediate environmental problems, not only for hazardous wastes but for environmental problems in general."

If this country could achieve similar prevention-related results from comprehensive oil spill legislation, we will have learned a true lesson from the Exxon disaster.

Senator BAUCUS. Thank you, Senator.

We're honored now to have as our first witness the Honorable Sam Skinner, Secretary of the Department of Transportation. Mr. Secretary, why don't you proceed.

STATEMENT OF HON. SAMUEL K. SKINNER, SECRETARY, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY JANE DE CELL, COUNSEL, AND CAPT. RICHARD LARRABEE, OFFICE OF MARINE SAFETY, U.S. COAST GUARD

Mr. SKINNER. Thank you, Mr. Chairman, members of the committee. It's a pleasure to appear again before this committee to re-

affirm the Administration's commitment to comprehensive oil pollution liability and compensation legislation that implements the 1984 protocols to the two oil spill treaties, CLC and FUND.

My testimony this morning will focus on three areas where there is possible disagreement between S. 1066, the Administration's legislation introduced by Senator Chafee, and S. 686, Senator Mitchell's bill.

Let me say first that I am encouraged as a relative newcomer to this issue, that I believe that progress is being made and will be made in the near future towards actual enactment of legislation. It is clear to me that the failure of previous Congresses to enact legislation provided significant impediments in the recent situation in Alaska, and we are fortunate in some respects when we understand that the company responsible for the injury and damage in Alaska is a United States company that has basically assumed the responsibility that we expect of it. That, of course, is a multi-billion dollar expenditure. And having been to Alaska three times myself, once shortly after the accident, I can assure you that the Federal Government does not have a mechanism at this time to deal with the situation effectively where the responsible party is a foreign carrier which does not have a mechanism to deal effectively with a large spill or wants to walk away from a situation that we had in Alaska.

I might also say, as was indicated by Senator Chafee, the Coast Guard has continued to do an outstanding job, using what I would consider to call archaic legislation in dealing, not only with the spill in this area, but two other spills in Texas and in the Philadelphia area, as well as, of course, continuing to operate full steam ahead, so-to-speak in the State of Alaska. And, of course, if the committee has any questions, I returned from Alaska just about 10 days ago from my most recent fact finding trip. And I can answer any questions.

There's no question that our nation now needs an oil pollution liability and compensation system that is international in scope and comprehensive in coverage.

Some have suggested the only protection that the Protocols provide the United States is protection for ships in innocent passage. That is not correct.

Let me give you just one example of the kind of incident that the Protocols can address. In 1973, the foreign tanker Zoe Colocotroni deliberately discharged one and a half million gallons of crude oil into a coastal area of Puerto Rico in order to free herself from a grounding and her owners refused to accept financial responsibilities for cleanup costs or damages. The oil damaged 23 acres of mangrove swamp inhabited by numerous marine wildlife. The cleanup cost the Coast Guard \$680,000 and damage to the mangroves, based on the cost to plant and maintain it and the attendant ecology, was \$6.2 million. Although Puerto Rico eventually recovered its costs, settlement took years. Imagine if this spill had been the size of the *Exxon Valdez*, which only halfway through the summer has cost Exxon \$600 million.

The question we must ask as we go through this process, is why should Americans suffer all the costs of oil pollution caused by foreign tankers when an international system exists to pay for clean-

up and damages? In 1988, foreign flag vessels accounted for some 59 percent of the oil spilled by tankers and tank barges. A vote for the Protocols is a vote for the environment.

President Bush has just returned from the Economic Summit in Paris. At that summit he expressed the concern of all Americans that national, regional, and global capabilities to contain and alleviate the consequences of maritime oil spills must be improved. He urged all countries to make better use of the latest monitoring and cleanup technologies. Further, he stressed the need for all countries to adhere to and implement fully the International Convention for the Prevention of Oil Pollution to the Oceans, and called on the International Maritime Organization to put forth proposals for further preventive action. Our continued failure to ratify the Protocols will severely hamper our efforts towards these objectives.

I recognize that the issue of preemption of State laws has been a factor in preventing passage of implementing legislation in the past. But in my opinion, the unquestionable benefits to be gained from the Protocols cannot be lost. It is time to find a solution to this problem. I am encouraged by what I've heard today, as well as what I've heard in the past, that all of the parties involved in this issue, all who feel very strongly from various points of view, are willing to sit down and try to find a solution to these problems. I think the areas that we share agreement in are numerous. They far outweigh the areas we have disagreements in.

On the subject of federalization, let me just say the Administration strenuously opposes legislation that would shift responsibility for cleanup away from the responsible party and onto the Coast Guard, by requiring automatic federalization of cleanup efforts. Under the Clean Water Act the Coast Guard is responsible for seeing that spillers quickly and properly clean up the pollution they cause and pay for that cleanup. If the responsible party is unwilling or unable to conduct the cleanup, the Coast Guard federalizes the cleanup. Either way, the Coast Guard is directly involved in the operation. And I might add, they've done an outstanding job in the recent spills all over the United States.

Let me comment here, it is also important, having been on the scene first hand in Alaska, having recognized the limited capabilities that were available to the Federal Government in the area of federalization, and the fact that the only available funding for the cleanup, had Exxon walked away rather than being held responsible by the Administration, would have been several million dollars. We were fortunate, again, just as we were unfortunate, that we were able to place continued pressure on the Exxon Corporation to assume their responsibility, and that our successes have resulted in the largest cleanup force in the history of the world, currently in place in Alaska, over 10,200 full time Exxon employees working this summer in Alaska, using 400 vessels, and 100 airplanes and helicopters, going forth in a multi, multi, hundred-million dollar cleanup effort.

So I think the mechanism that we currently have of allowing the Coast Guard to encourage people and companies to become involved in the cleanup and hold them responsible is the right one, rather than automatically federalizing a spill, thus lessening the

responsibility on the spiller. Therefore, I believe our bill is appropriate in the way it deals with those issues.

There are just two other points that I'd like to clarify. First, the decision of whether to stay on the scene and complete the cleanup is often a boardroom, not a courtroom, decision. And second, automatic federalization invites the spiller to walk away.

The Administration's comprehensive oil pollution liability and compensation legislation, S. 1066, is structured around the concept of shipowner liability and responsibility. The limits it sets on tanker owners' liability are identical to those in Senator Mitchell's bill, \$500 per gross ton. Based on our past 18 years experience, that level of shipowner's liability will cover 95 percent of all spills. And identical to Senator Mitchell's bill, it creates a backup fund for catastrophic environmental damage. Third party claimants could bring a direct action against the vessel's insurer, up to the vessel owner's limit of liability. Beyond that limit of liability, the third party claimant could bring an action in Federal court under State law, or against the international fund if the Protocols are in place. We believe that this is the proper sharing of responsibility and therefore oppose the payment of third party claims for economic damages from the domestic oil spill liability trust fund.

We support a presidential waiver of the \$500 million per incident cap on payments from the oil spill liability trust fund, and are encouraged by Senator Mitchell's comments here today regarding the necessary limitation. I might add, I sense from the comments today that Senator Mitchell shares the Administration's viewpoint, that based on the experience in Alaska, where I suggest the cleanup costs to Exxon, even before some of the other costs that they will incur and some of the other judgments they will incur, could equal as much as a billion dollars, that a billion dollars is not too small a number to seriously consider in the legislation.

Although the waiver exposes oil companies to unlimited liability, through their payments into the domestic fund, for environmental damage that exceeds the shipowner's limit of liability, we believe this exposure is justified.

Finally, I'd like to address the issue of civil penalties. The committee has pending before it two bills dealing with this issue, S. 687 and S. 1223, as well as our bill, S. 1066. The Administration strongly supports an increase in the civil penalties for discharges of oil or hazardous substances into the waters of the United States. I commend the committee's leadership on this important issue, and look forward to working with you as these bills move through the Senate.

In conclusion, we are united in our goal to protect the environment and to compensate our citizens. The time is now to settle the few differences that remain on comprehensive oil pollution liability and compensation legislation, and move forward with legislation that can be enacted and signed by the President.

I'm happy to answer any questions that you might have.

Senator BAUCUS. Thank you, Mr. Secretary. I think I'll turn first to the Majority Leader to begin this round of questions.

Senator MITCHELL. Thank you very much, Mr. Chairman.

Mr. Secretary, thank you very much for your statement. We welcome your involvement and participation, and look forward to

working with you to develop legislation that will achieve our common objective of providing protection against the damage from oil spills. We do have some disagreements, but notwithstanding that, I believe that working in good faith we can come up with legislation that will be beneficial.

I have a few questions regarding the Protocols, and I'd like to get to those first. At the Foreign Relations Committee hearing, a couple of years ago, Senator Pell questioned Admiral Kime about the extent to which the Protocols relieve the captain or pilot of any liability. In Article 4, Paragraph 2, the Protocols are quite explicit in making clear that no claim for compensation or pollution damage or otherwise may be made against any of the employees.

The State of Washington, and I believe their Attorney General is here, and we're going to ask him about that later, has a law which holds such persons liable if they are negligent or cause the accident. They believe, and I believe with them, that that serves as a deterrent to negligent action. The whole principle of negligence is that if you create a sufficient penalty, persons will be more careful in their actions.

My question is first, do you agree that the Protocols explicitly and totally relieve from liability for compensation damage all of the employees involved, including a negligent, drunken, captain or master?

Mr. SKINNER. Yes, the Protocols channel all suits through the shipowner. The shipowner than sues the employees.

Senator MITCHELL. Second, do you believe that to be in the interest of the public, so that a person operating a tanker knows, in advance, if the Protocols were adopted and preempted the law of Washington and other States, that no matter what he did he could not be held liable for any damage?

Mr. SKINNER. Let me say in an ideal situation, Senator Mitchell, we would like to have basically everything that we can have across the board, and I think you and I understand that. A major issue, because I share your observations that we must have sufficient penalties and sufficient liability in place so that the responsible parties will be responsible in the day-to-day operation of their vessels, if it's no more than for the reason that they will be penalized, or fined, or be found liable if they are not.

The concerns that we have in looking at the State laws deal primarily with the inability in many situations to enforce, in the case of foreign vessels, against possible shell corporations and others, and to obtain judgments. We all know, and you know much better than I having served as a distinguished judge for so many years, that it is quite easy in many cases to seek judgments. In some cases it is even easy to obtain judgments. It is always not so easy to enforce judgments. And the enforceability of judgments in foreign courts that are effective quickly, in my opinion, is a significant deterrent, or to put it in another word, an encouragement for parties to be responsible.

For example, in contrast to the Exxon Valdez situation, I would compare the Amoco Cadiz situation in France. Soon a judgment will be entered. It will be 12 years without a dollar having been paid by the Amoco Corporation, and the final judgment will be in the area of about \$180 to \$190 million. Why should the people of

France, or the people of the United States if the roles were reversed, wait 12 years with some serious legal issues still to be faced by the courts concerning liability, in a situation like that? And I think you and I might acknowledge, might agree, that it is sometimes easier for foreign countries and companies to obtain judgments in this country than it is for American companies to obtain judgments in other countries. So the tradeoff in the negotiation of the Protocols appears to be sureness of penalty versus possible penalties of a broader nature, but much longer to obtain.

Senator MITCHELL. I respect your point of view. I'll simply say that much of American and English civil law and criminal law is based upon the principle that persons are accountable for their actions. It is that accountability which our law believes creates a deterrent to anti-social or other damaging behavior. By relieving a ship captain or all other employees of any financial responsibility for their actions, no matter how egregious, how negligent, how reckless, you propose a course of action that runs directly counter to the fundamental principles of American civil and criminal law. I don't believe that the benefits outweigh that disadvantage. I respect your opposite point of view.

I'd like to go to that question of what are the benefits under the Protocols? In my testimony last week before the Foreign Relations Committee I made the following statement. I will repeat the statement and ask you to either confirm that my statement is accurate, or if it is inaccurate, I would like to know where it is inaccurate.

I said, the Protocols provide coverage beyond what current Federal and State laws can provide only under the following limited set of circumstances: First, the parties owning the vessel and/or the cargo have no interest in the United States; second, the vessel is moving in innocent passage through United States' waters; and third, the vessel is not stopping at any U.S. port.

I believe that to be a very limited set of circumstances. So my question to you is, do you agree or disagree with the statement I have made, and if you disagree would you please tell me in what respect my statement is incorrect?

Mr. SKINNER. The innocent passage issue is a small part of the overall problem. And the important part is that they allow a way to enforce judgments that affect all foreign vessels. And that is a significant difference, we believe, than what currently exists.

Senator MITCHELL. Mr. Secretary, may I suggest if you choose to do so, because we're getting into some details, and I understand that, you may wish to respond in writing to any question at a later time.

Mr. SKINNER. I think we better do it on that one.

Senator MITCHELL. I understand, and that may be more fair under the circumstances. I would like you to do that.

Mr. SKINNER. Okay, thank you.

Senator MITCHELL. I'd like to get a specific answer to my question, because I believe that if my assessment is correct, and again, I invite any dispute that it is not correct, that—and I make clear now, I'm not suggesting this is the only coverage under the Protocols. What I'm saying is this is the only coverage over and above what current Federal and State laws can provide. The only coverage is under the narrow set of circumstances described in which

those three conditions are met, which means a very minimal increase in coverage in exchange for which we are giving up a great deal, not just the question of removing the deterrent of responsibility for his actions by any captain or person involved, but in addition giving up the ability to exceed the limits of liability in the Protocols, which is entirely a separate question that I would like to get into.

Mr. SKINNER. I think we better get our response in writing.

[The information referred to follows:]

Question posed.—If the United States adopts the 1984 OLC and FUND Protocols, the application of existing State laws respecting liability for oil pollution damage will be affected.

Is the degree to which the State law regimes will be affected justified by the benefits to be obtained by the adoption of the Protocols?

Will the costs to the nation's interests reflected in the current application of State law liability regimes be greater than those benefits?

How State laws would be affected by the adoption of the 1984 protocols; Provisions of the 1984 Protocols which would affect State laws.—There are only two paragraphs of the 1984 Civil Liability Convention (the 1969 Convention on Civil Liability for Oil Pollution Damage, as amended by its 1984 Protocol) which would alter the application of State law. They are paragraphs 4 and 5 of Article III of that Convention. There is no provision of the 1984 Fund Convention (the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, as amended by its 1984 Protocol) which would alter the application of State law.

Paragraphs 4 and 5 of Article III of the 1984 Civil Liability Convention provide as follows:

4. No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against: (a) the servants or agents of the owner or the members of the crew; (b) the pilot or any other person who, without being a member of the crew, performs services for the ship; (c) any charterer (however described, including a bareboat charterer), manager or operator of the ship; (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority; (e) any person taking preventive measures; (f) all servants or agents of persons mentioned in subparagraphs (c), (d), and (e); unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

5. Nothing in this Convention shall prejudice any right of recourse of the owner against third parties.

The effect of the provisions on State law.—By virtue of paragraph 4 claims against the ship owner for "pollution damage" may only be made "in accordance with" the 1984 Civil Liability Convention. Claims against the ship owner for damages not falling within the Convention's definition of "pollution damage" may be made in accordance with any other applicable law.

Paragraph 4 also provides that claims for "pollution damage" may not be made under any law against the persons listed in clauses (a) to (f). That bar would not preclude an action against such a listed person under State law where the law imposes liability on the basis of the persons' intentional or reckless act or omission, as described in the final clause of paragraph 4. As with the ship owner, this provision does not affect any law which imposes liability for damages not falling within the Convention's definition of "pollution damage".

Furthermore, it is important to recognize that this provision does not absolve those persons from "pollution damage" liability, for the owner's right to proceed against them in "recourse" (such as an action in indemnification or contribution) is preserved by paragraph 5. Laws providing for such a recourse action may be utilized by the ship owner to impose that liability, to the extent that the owner has liability for that pollution under the Convention.

Finally, note should be taken that either of these two paragraphs (and accordingly neither the 1984 Civil Liability Convention nor the 1984 Fund Convention) affects the power of any State to: (a) prescribe or enforce civil or criminal actions against any person for conduct which such State prescribes to be unlawful; (b) establish, finance, maintain, or use a fund for any purpose whatsoever; or (c) prescribe liability for any class of damages for any person not referred to in paragraph 4.

In sum, if the United States were to adopt the 1984 Protocols—

(a) State law could not be applied so as to impose "pollution damage" liability on the ship owner otherwise than in accordance with the 1984 Civil Liability Convention; and (b) State law could not be applied so as to impose "pollution damage" liability on persons listed in clauses (a) to (f) other than in a recourse action by the owner, or where an intentional or reckless act or omission referred to in paragraph 4 resulted in the "pollution damage".

Benefits to be obtained by participation in the 1984 protocol regime.—There are three benefits which the United States would enjoy upon the entry of force of the 1984 Protocols which, as either a legal or practical matter, are not available under laws enacted by States: (1) Mechanisms to enhance assurance that assets of the ship owner or its insurer will be available to meet compensable pollution damage claims; (2) Worldwide sharing of the costs of major United States oil pollution incidents; and (3) Enhancement of the ability of the United States to influence the structure of international maritime and environmental regimes and institutions.

AVAILABILITY OF FUNDS

The 1984 Civil Liability Convention provides a financial security (responsibility) regime under which each Party is required to assure that ships sailing under its flag or using its ports must have insurance or other financial security to cover the owners' liability under the Convention up to the limits prescribed therein. The Convention also provides for direct action for incurred pollution damages against that insurer.

Jurisdiction under the Convention is established merely by the location of the incurrence of pollution damage. (This would even establish jurisdiction in the United States where costs are incurred by the United States in response to an oil pollution incident in the exclusive economic zone.) There is no need to establish *in rem* or *in personam* jurisdiction over either the ship owner or insurer. There need only be notice to the defendant, an opportunity for the defendant to present its case in the proceeding, and an absence of fraud to obtain an enforceable judgment.

Finally, when the judgment becomes enforceable in the United States it is enforceable in the courts of any other Party to the Convention (including the Party under whose laws financial security has been established, thereby making it possible to reach the insurer). Either the claimant itself or a national fund (such as one established under Federal or State law) which has compensated the claimant may enforce the judgment in such a Party's court.

Theoretically a financial responsibility regime providing for direct action could be established under State law. However in order for such a regime to work, it is necessary for insurers to provide the necessary insurance on those terms. Historically, insurers have been unwilling to accept such terms for individual States, except in very limited situations involving low levels of liability.

Under such circumstances claimants, even where they can obtain *in personam* or *in rem* jurisdiction under State law in State courts, would have only the assets of the defendant available to them for the satisfaction of their judgments. In cases of defendant corporations having limited assets (such as single ship corporations), claimants would have little hope in obtaining full compensation on those judgments. Furthermore, if claimants (or a fund which has compensated claimants) take their judgments to foreign courts in countries where assets may exist, their ability to recover against those assets is highly problematical.

WORLDWIDE SHARING OF COSTS

The 1984 Fund Convention provides a means by which costs of major oil pollution incidents may be shared by the receivers of oil in countries which are Parties to the Convention. This wide spreading of risk would reduce the burden which a particular nation might otherwise be forced to bear on its own. Under the 1971 Fund Convention 42 Parties share the comparable risk (there are 64 Parties to the 1969 Civil Liability Convention). It is expected that most of these, as well as other, States will adopt the 1984 Protocols. (Two countries, France and the Federal Republic of Germany, have ratified the 1984 Fund Protocol.)

If the Convention were to enter into force for the United States, this country would both contribute to and benefit from such a sharing. There are two points which should be kept in mind in this connection. First, as among courts in the nations of the world United States courts are more likely to place a higher value on pollution damages than others. Second, experience in recent years has demonstrated that a large proportion of the world's tanker casualties have occurred off United States' coasts or in United States' waters.

At the present time CRISTAL (Contract Regarding a Supplement to Tanker Liability for OIL Pollution), the oil industry's voluntary compensation agreement, provides a somewhat similar risk sharing arrangement. Under that agreement CRISTAL's oil company members (including those in the United States) contribute to compensation paid to oil pollution damage claimants throughout the world when necessary to supplement amounts paid by ship owners. CRISTAL even provides some reimbursement to its members who are required to contribute to incidents subject to the 1971 FUND Convention.

It is interesting, however, that under the agreement the CRISTAL regime will not compensate claims which were previously prosecuted against other funds supported by assessments against oil companies. See Clause IV(D)(7) of CRISTAL. As a consequence, even though oil received in the United States by CRISTAL members contribute to oil pollution damage compensation occurring elsewhere in the world, oil received in other countries does not contribute to United States claims presented first to oil industry financed State or Federal funds. There is no comparable restriction imposed under the 1984 Fund Convention respecting the use of any State or Federal fund.

The CRISTAL regime is currently in effect, with the restriction noted. Should the 1984 Fund Convention obtain broad participation throughout the world (a likely situation given United States' adoption the need for the CRISTAL regime would pass, and with it the disincentive which it gives to the use of State and Federal funds supported by the oil industry.

U.S. INFLUENCE

In the latter days of the 1984 Conference it appeared that agreement as to levels of ship owner liability and overall compensation might not be reached. One group of representatives, of which Japan was a predominant member, were seeking relatively low levels. The other major group, in which the United States played a leadership role, were seeking to have the Conference adopt high levels. A number of nations not formally sponsoring either proposal desired to have the United States participate in the regime. Nevertheless those countries were concerned that the United States, having taken an active role in the development of the 1971 Fund Convention, had never adopted that regime while Japan was an active participant.

At the end of the Conference a compromise much closer to the proposal supported by the United States' was adopted. It was clear that many of the governments represented were relying heavily on the United States to follow through on its leadership role at the Conference. This expectation continues. At a recent Conference on Marine Salvage involving important environmental issues, other governments' representatives demonstrated significant unwillingness to follow the leadership of the United States, including making formal references to its failure to adopt the 1984 Protocols.

Frank Wiswall, an American former Chairman of the International Maritime Organization's Legal Committee, has stated:

Inevitably, the domestic impact of international maritime regulation will grow, whether or not the United States becomes party to more of the existing and proposed instruments that it has in the past. The professed rationale for nonratification has been that domestic American standards were generally higher than anything that the Conventions could offer. In the present day, this is patently not so. Both history and the author's personal observations support the conclusion that the apparent policy of the United States delegations to diplomatic conferences is to apply considerable public and private pressure to shape the instrument according to U.S. wishes. In the case of the legal conferences, however, it has been more often true than not that ratification of the instrument—shaped at least in significant part by such pressure—has not even been recommended to the Administration of the day by the concerned cabinet departments. The writer will say flatly that the currency of goodwill which the United States once possessed to spend in abundance at maritime diplomatic conferences has by the present been totally squandered. This unhappy international perception of the United States as the "do as I say and not as I do" exemplar in such affairs can be overcome only by a successful campaign on the part of the concerned interests, including maritime lawyers, to induce ratification of all important outstanding maritime conventions, whether technical or legal. Wiswall, *Uniformity in Maritime Law: The Domestic Impact of International Maritime Regulation*, 57 Tulane L. Rev. (1983) 1208 at 1236-1237.

The formulation of international instruments concerning important maritime and environmental subjects, including a draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea, are currently before the IMO Legal Committee. It is clear that there is minimal support

for positions preferred by the United States. Without the willingness of other governments to reply upon the leadership role of the United States in upcoming deliberations, there is a distinct likelihood that the regimes which those instruments create will not reflect United States interests, and, indeed, may have a significant adverse impact on important United States environmental and economic concerns.

STATE LAW BENEFITS AFFECTED BY THE 1984 PROTOCOLS

The benefits.—As explained above, United States adoption of the 1984 Protocols would affect the application of State law in two ways: (a) State law could not be applied so as to impose "pollution damage" liability on the ship owner otherwise than in accordance with the 1984 Civil Liability Convention, and (b) State law could not be applied so as to impose "pollution damage" liability on persons listed in clauses (a) to (f) other than in a recourse action by the owner, or where an intentional or reckless act or omission referred to in paragraph 4 resulted in the "pollution damage".

A number of States have enacted laws which impose liability for costs and damages, which might fall within the definition of "pollution damage" as defined in the 1984 Civil Liability Convention, against one or more of the persons referred to in Article III, paragraph 4, of the Convention. Some of those laws impose liability without limitation. Some impose liability without defenses or with fewer defenses to strict liability than those provided under the Convention.

Those are the two types of provisions underlying the argument that significant benefits would be lost to the United States should it adopt the 1984 Protocols. The benefits referred to are: (1) the imposition of greater liability on those entities most responsible for pollution, and, related thereto; and (2) the encouragement of a greater degree of care on the part of potential polluters.

[Notably, other State laws are based on a negligence standard of liability or have defenses to strict liability which are equal to or greater than those provided under the Convention.]

The relationship between the benefits is obvious. Greater enforceable liability tends to encourage greater degree of care. Conversely, where liability may be avoided, there is less encouragement for care. Accordingly, the two benefits may be considered together.

As to the ship owner—unlimited liability.—Looking first to the ship owner, the arguable benefit which unlimited liability provides (no State law provides liability limits greater than those in the 1984 Civil Liability Convention) is for dollar amounts above those provided in the Convention in circumstances where the owner would be entitled to assert such limits. The benefit does not apply to cases in which the total of the pollution damages fall within the Convention's liability limits.

Assuming the approximate current exchange rate of \$1.30 per Special Drawing Right, owners would be entitled to the following: (a) for the first 5,000 tons of the ship's gross tonnage—\$3,900,000; (b) plus \$546 per ton above 5,000; and (c) not to exceed a total of \$77,610,000 (reached at 140,000 gross tons).

A recent study¹ found that 50 of the 53 major spills which have occurred in the United States over the past 18 years would have fallen within those limits.

The *Exxon Valdez* incident was an extraordinary case in which the limits would not have covered the total pollution costs and damages. Should a similar case occur in the future under circumstances where the ship owner would have no entitlement to limit liability as a matter of law, a State unlimited liability regime would assure that the ship owner would have to carry the entire burden of the incurred pollution damage. However, this result applies only where the owner has no other means to avoid unlimited liability and has sufficient assets to satisfy a judgment in any amount. It would not obtain where a corporate owner's assets are limited to the ship concerned or where its other assets are located abroad.

Insurance cannot be relied upon to assure the availability of assets to satisfy judgments under unlimited liability regimes. No insurer will provide unlimited coverage, and insurers have historically been unwilling to provide specific cover for particular State liability regimes, unlimited or not.

As to the ship owner—no defenses/less defenses.—A similar analysis may be applied to the matter of ship owner defenses, for as noted, some State liability regimes allow fewer defenses to pollution damage liability than the 1984 Civil Liability Convention or no defenses at all. The benefit provided by such regimes would apply only to those cases where the Convention defenses do not apply.

¹ Temple, Barker, and Sloane, *The International Oil Spill Protocols: Should the United States Ratify*, Executive Summary (October 2, 1988).

The ship owner's defenses under the Convention apply only when the pollution damage: (1) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; (2) was wholly caused by an act or omission done with intent to cause damage by a third party; (3) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or (4) with respect to a particular claimant, resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person (not necessarily a complete defense to liability to such a claimant as the court may allow partial recovery).

As to the first three defenses, it may be seen that the benefit provided by no defense State regimes is rather limited. It would be the unusual case where the Convention's defenses absolve the ship owner from liability. The fourth, or claimant specific, defense applies only to the claimant concerned. Hence, the "benefit" of the State regime would be limited to permitting such claimants to recover benefits despite their intentional or negligent acts.

As to other parties.—Finally, under the Convention actions by claimants are barred against the parties listed in clauses (a) to (f) in Article III, paragraph 4. Consequently, it may be argued that State regimes imposing liability against such parties provide a benefit not available under the Convention. However that benefit is limited. First, the bar does not apply to cases involving intentional or reckless and knowing conduct on the part of the parties. Second, it does not apply to the owner's right of recourse.

Insofar as third party acts are concerned, the ship owner is absolved from liability only when the pollution damage results wholly from the third party's intentional act. In such a case, the Convention would not preclude an action under State law against such a party even though it falls within one of the listed categories.

Should a listed third party be subject to liability under State law when its conduct is less culpable, the Convention does not absolve it from liability, for the ship owner having been held liable under the terms of the Convention may recover from that third party in a recourse action.

Consequently the State law benefit resulting from such a party's liability would be affected by the Convention only to those nonintentional and non-reckless cases in which the ship owner has a defense to its liability, or to the extent that that liability is limited.

SUMMARY OF COMPARATIVE BENEFITS

The 1984 Protocols provide the following benefits not available under State law: (1) Mechanisms to enhance assurance that assets of the ship owner or its insurer will be available to meet compensable pollution damage claims; (2) Worldwide sharing of the costs of major United States oil pollution incidents; and (3) Enhancement of the ability of the United States to influence the structure of international maritime and environmental regimes and institutions.

State law may, and in some States does, provide the means by which the entire pollution damage burden may be imposed on persons, together with the related encouragement to a higher standard of care, through the use of unlimited liability and no-defense/less defense statutes. Those benefits would be precluded by the adoption of the 1984 Protocols in the following cases: (1) Where the liability limits under the 1984 Civil Liability Convention are not high enough to cover the pollution damage and the ship owner has assets available to the State court to satisfy the judgement; and (2) Where the defenses under the 1984 Civil Liability Convention would apply and the ship owner has assets available to the State court to satisfy the judgement.

Since the affected potential liability under State law would apply only in the unusual or extraordinary case, a serious question may be raised as to whether the potential for such a liability would provide the desirable encouragement to a higher standard of care in most cases. Indeed the question is particularly apt when considering foreign and single ship corporations.

The foregoing analysis leads to the conclusion that the benefits achievable under the 1984 Protocols clearly outweigh those arguably available under State law which might be affected by the adoption of the Protocols.

Senator MITCHELL. And let me ask you one other thing, and then I'll yield to my colleagues, because I know they have questions, and then I'll come back on the next round if that's all right.

On Page 4 of your statement the bottom of the page, you say, in 1988 foreign-flag vessels accounted for some 59 percent of the oil spills by tankers and tank barges. If we're truly serious about collecting cleanup costs and damages from these Protocol vessels, then we must have the Protocols. Those two sentences create an implication that the only way to get coverage on those vessels that spilled 59 percent of the oil is through the Protocols. How much of that would be covered under current and Federal law in any event, and therefore the Protocols provide no additional coverage, but merely a different means for accomplishing the same objective.

Mr. SKINNER. It was not meant to leave it that this would be the only way. As you know, there are a number of ways it can be recovered now, and we did not mean to leave the implication that would be only way.

But the point we were trying to make, I think, Senator, and maybe inartfully, is the fact that a substantial amount of the oil being transported into this country today is by foreign flag carriers, and that given that the liability, if we are unable to obtain judgments, albeit State judgments or Federal judgments, against foreign carriers, then we will lose the opportunity. I think we would not be arguing about the Protocols at all if we were all convinced that we could obtain quick judgments in a vast majority of the foreign tanker situations where spills occur.

Senator MITCHELL. Mr. Secretary, I thank you. I yield to my colleagues, and I'd like to come back, if I could, on liability.

Senator BAUCUS. Sure. Thank you.

Mr. Secretary, I don't mean to belabor the point, but I think the point that the Leader is making, is a point that I also want to hammer home a little more definitely, and that is that my reading of the Protocols is that a very small percentage of foreign ships would be covered under the Protocols that are not otherwise covered.

Mr. SKINNER. Right. And I think the—

Senator BAUCUS. And it's about 10 percent. Now, you mentioned that a very large number of ships bringing oil to the United States are foreign owned, those ships are already covered, currently, because they stop in U.S. ports. The Protocols only address, as I read them, that very small fraction of ships who are passing through U.S. waters, but who are not stopping in U.S. ports. And if those ships are delivering oil to the United States, by definition, they're not covered under that class.

Mr. SKINNER. Well, I think Senator Mitchell's request that we break out what spills in the past would have been covered by current legislation and current penalty and current provisions versus those spills that would not have been covered to some degree we are trying to anticipate and protect the American taxpayer and the environment, or at least be able to recover in a catastrophic situation, an *Exxon Valdez* type occurrence. You know, if we don't have recovery available under normal circumstances, any responsible party doesn't step forward.

Senator BAUCUS. A second point, even if there is this tradeoff between additional jurisdictions because the Protocol on the one hand and increased liability, and perhaps State liability on the other hand, even if there is a tradeoff, and I don't believe there is for the

reasons that Senator Mitchell and I have discussed, but even if there is, to the degree that you were earlier replying do you still believe that a significant liability is an incentive for a company or a cargo owner to take requisite actions to prevent, or at least increase the likelihood of the prevention of a spill?

Mr. SKINNER. Yes, there's no question, having served as a lawyer for many years and on both sides of the aisle, so-to-speak, there's no question that if a party recognizes they'll be either penalized, fined, or have heavy judgments entered against them, there will be an additional incentive for them to act responsibly. I don't think anyone can doubt that in any way.

The question is how high the incentive has to be, and when the deviation is. I do believe the ability to walk away from a situation is something that must be prevented. And finally, and it does appear, which we haven't really talked about, is that there's also access under the Protocols to an international fund, of which the United States is only a small contributor. And that means that the American taxpayer will be relieved of those type of situations, and that there will be a cost-sharing of spills on an international basis. So that is an additional factor.

Senator BAUCUS. But the American taxpayer is also relieved, if there's significant potential liability, which obviously would not accrue to taxpayers but to the company and perhaps to consumers.

Mr. Secretary on page 10 of your testimony you state:

The Administration strenuously opposes legislation that would shift responsibility for cleanup away from responsible parties and onto the Coast Guard by requiring automatic federalization of cleanup operations.

Mr. Secretary, my reading of the Clean Water Act currently is that the President is not required to clean up a spill even if the cleanup is not being done properly by the responsible party. Is that correct?

Mr. SKINNER. Well, is it mandated?

Senator BAUCUS. That's my question, yes.

Mr. SKINNER. Well, the Coast Guard has the responsibility to ensure that the cleanup goes on. Is it mandated—

Senator BAUCUS. There's no requirement in current law that the President federalize even if the cleanup is not being done properly?

Mr. SKINNER. Well, there's no question that there's an option of federalization, and the federalization option, frankly, as it exists under current law is in its weakened state, is more form over substance. In other words, in order to marshal the amount of resources necessary to do a cleanup of the magnitude of the one in Prince William Sound you have to have readily available a significant amount of resources, time and money. The industry has just proposed a \$250 million program.

Senator BAUCUS. As you know, one of the bills before this committee provides that the President is required to clean up a spill unless he finds that the cleanup is being done properly by the responsible party. Do you object to that language?

Mr. SKINNER. Yes, and let me say why. I think we're dealing with semantics. The President is, I think, under the statute directed to take responsibility to ensure that the cleanup occurs. That doesn't mean federalization, although that's an option.

Senator BAUCUS. But didn't we establish the President is not directed to take action?

Mr. SKINNER. As in contrast to the language that's been suggested?

Senator BAUCUS. No, currently the President is not required to take action.

Mr. SKINNER. I believe if you look at all of the statutes put together it clearly establishes that he is responsible. I don't think it's specifically laid out, but I don't think you can say the Coast Guard is responsible to do this, this, this and this, and say that the President is not responsible.

Senator BAUCUS. Well, let me read the appropriate statute. I don't mean to belabor this, but section 11(c)(1), which provides that the President is authorized to act; first of all it's only an authorization. Second, it says, unless he determines that such removal be done properly. So there's no requirement.

Mr. SKINNER. Well, we're again dealing in what I think—I think if that particular language is correct, I think if you look at all of the statutes that deal with this issue and place responsibility in various sources, I think one could read from that, although not maybe statutorily explicit, that there is a responsibility from all of that that the responsibility for the cleanup go forward, but we'll answer that question in writing as well.

Senator BAUCUS. If you could please. But the question is, why do you oppose clarification.

Mr. SKINNER. Let me explain why. Because I believe that—and I refer to it sometimes as, when he designated me as the National Spill Coordinator, that's much like being the captain of the Hindenburg, it's not an assignment someone seeks. It is an assignment that is, in the case of Alaska, is a tremendous, tremendous responsibility and, generally, as in the situation in Prince William Sound, that responsibility by statute is on the industry that was developing those resources as well as Exxon, under the supervision of the State of Alaska which approved, or was supposed to approve and supervise the contingency plan. To relieve those corporations of that responsibility and say, the Federal Government is going to do it, you don't have to worry, is not in my opinion the best way.

One way is watching the way a corporation can respond when they're held responsible. The Federal Government cannot respond as quickly as a private corporation in dealing with some of the resources. Let me give you just two examples. They recognized they were going to employ 10,000 people this summer. So Exxon calls up on the phone, orders 100,000 pairs of socks and they arrive the next morning. Exxon calls a pump manufacturer and says, we think this pump may work, how many of them do you have. They say, well, we've got our year's supply and it's 200. Send them tonight, you know, a private airplane will be on the ground, bill us later. If we're going to require that, then we better have a procurement method that allows the Federal Government to call by phone and order 100,000 socks, 200 pumps, contracting for airplanes outside the defense fleet. They put a phone call in, it's like that. I haven't seen a response like that to anything in the procurement side.

Senator BAUCUS. Mr. Secretary—

Mr. SKINNER. I'm just using that—I don't mean to take a lot of time—

Senator BAUCUS. That's the problem.

Mr. SKINNER. I know it's a problem. That's an example I'm trying to send, that a private corporation without the restrictions that the government has, if properly held responsible, can react quicker than the Federal Government in dealing with men, material and supplies.

Senator BAUCUS. Mr. Secretary, I'm only establishing that I believe that we should clarify the language so that the American public and the Administration and companies know what the law is, that is, the degree to which the President does or does not have responsibility. I believe that it's important to clarify that situation. And I also, therefore, believe that it is important for the oil spill legislation to provide that the President does have responsibility, unless he determines that the spill is being cleaned up promptly and properly. That establishes responsibility, but it also allows the President, in his own judgment, I'm sure if he exercised it this way in some cases, that the company itself should proceed because it's appropriately cleaning up the spill.

The legislation can also provide that the company is not relieved from liability to avoid that problem, clarify that problem. I think that it's important for us to establish those clarifications, because otherwise we're dealing with a lot of ambiguities.

Mr. SKINNER. And I might say we do—

Senator BAUCUS. And the fundamental reason is this, if there's a spill we should forthwith move to clean it up. Every hour counts. We should not be wasting time worrying about who's responsible, who's not responsible. Spending time worrying about whether the President does have responsibility or does not have responsibility. It's critical that we, as much as possible, clarify those problems in statute so that we can begin to do what's most important, and that's clean up the spill.

My time has expired.

Mr. SKINNER. Well, I agree. I think we can work on making sure that the mechanism is clear. The only thing we don't want to do, in working out that language, Senator Baucus, is to make it appear to the industry that they don't have the primary responsibility.

Senator BAUCUS. Well, we can make that very clear in our statute.

Mr. SKINNER. I think that is important.

Senator BAUCUS. We can do that. I'm sorry, my time is up.

Mr. SKINNER. OK, good.

Senator BAUCUS. Senator Chafee.

Senator CHAFEE. I thank you, Mr. Chairman.

Obviously the hangup on this legislation is going to be the preemption provision in the Protocols. This is a murky area where the Majority Leader obviously feels very strong, and this committee has sustained that in the past, whether that's the right position to take. I understand the procedural setup with the House of Representatives is that they're set in concrete for the Protocols, and for preemption. And that's my understanding. I don't know whether the Majority Leader knows differently or not. So we get between a

rock and a hard place, and we pass legislation, but it goes nowhere, vice versa.

I would ask you, Mr. Secretary, under the Protocols, as you suggest, there's a limit thus, under the claim against the malefactor, as it were, but as you say on page 10, you support a Presidential waiver of the \$500 million per incident cap on payments from the oil spill liability trust fund, so that no environmental damage goes uncompensated. Now, isn't that your answer to the Majority Leader's point that the polluter should pay up to the full extent? In a way the person who suffers damage is going to be compensated if this fund is of adequate size. Am I correct in that?

Mr. SKINNER. I'd like to think I could totally agree with that, but I think that the Majority Leader might point out that third party claims are not covered. So rather than having him point it out, I think I'll point it out.

Senator MITCHELL. Thank you, Mr. Secretary.

Mr. SKINNER. What preemption really deals with is third party claims and how they're going to be compensated. The Majority Leader and some of the States, as well as a number of members of some of the committees feel, that that should not be preempted.

Senator CHAFEE. Well, let me ask you another question.

Mr. SKINNER. I hate to take his position when you're taking mine, but I think I've got to.

Senator MITCHELL. You're such a good lawyer I don't think you need a defense attorney.

Mr. SKINNER. I need all the help I can get up here.

Senator CHAFEE. You think those Protocols are so wonderful, but nobody's ratified them. Why is that?

Mr. SKINNER. Well, everybody is watching what we're doing here in the United States, so we have a chance again to be leaders in the world.

Senator CHAFEE. I've heard that argument before. I find that a little hard to believe that everybody's waiting for us. After all, how much shipping of oil does the United States do in the world.

Mr. SKINNER. Well, we're receiving more oil than any other country, that's for sure, and it's going up, I might add, the way we're becoming more energy dependent.

Let me just say this. The Protocols have gotten in the way. I think we all understand, some better than others I suppose, that we cannot let preemption get in the way if it can be avoided at all, yet we've got to find a compromise here somewhere. And I think Senator Mitchell and I, and you, and members of the committee, and Chairman Baucus will have to find a way, working early on, to see if we can get through this thing, whether it be in Conference or even before, because I do not think it is in the interest of this Country to go through another year without comprehensive legislation in place. The risks are too great.

Senator CHAFEE. Well, nobody on this committee would disagree with that. But we do, as I pointed out earlier, have this conflict with the House on the subject.

There's a lot to do with the Protocols as far as third world nations are concerned. I think that if we believe that the environ-

ment is an international concern, I suspect that third world nations that are relatively unsophisticated, and don't have the system to go about suing the vessel, or don't have all the laws that we might have, they could collect from this fund if the Protocols were in effect, and mitigate the damage that took place. I think that's an argument in favor of the Protocols. We've got to take a broader view than just solely the United States' point of view. I think we've got to look at the environment as an international concern as well.

Senator MITCHELL. But do you think we should preempt the laws of Maine and Rhode Island, exposing them to liability in order to help people in other countries?

Senator CHAFEE. Well, the question is whether, in the suggestions that the Administration is making, whether we are going to expose them to such liability. That's obviously the question here, and that's why we've sat here for, I guess, eight years hearing about the strong laws Maine has, and how they do not wish to be preempted by Federal legislation.

But my point is, how are we going to get on some legislation?

Senator MITCHELL. Well, I'd simply note for the record that I believe there will be inserted in the record this morning, a letter from the Attorney General of Rhode Island, stating his intention to introduce legislation in the next General Assembly to allow Rhode Island to establish an oil spill contingency fund patterned after the existing law in the State of Maine.

So, our preaching about the Maine law has reached some people.

Senator CHAFEE. That's right. Your voice has carried far.

Mr. SKINNER. Especially right down the road. I might add that the funds, of course, would not be preempted.

Senator CHAFEE. Could the Senator from Maine read the balance of that letter? Does he mention Protocols?

Senator MITCHELL. Well, we'll put the letter in the record, but what he does say is that I would greatly appreciate your assistance in conveying my opposition to any measure which would preempt individual States from adopting strict liability laws to ensure that they're fully compensated in the most expeditious manner possible.

Senator CHAFEE. That's the only mention of Protocols?

Senator MITCHELL. Well, I'm looking to see if he does—you've got it there, you can read it. I don't see the word, Protocols, in here.

Senator CHAFEE. Well, since you brought up the letter, why don't we refer to page 7 at the bottom.

Senator MITCHELL. I have a two page letter. If you've got a page 7, you've got five more pages than I have.

Senator CHAFEE. Well, he has to explain it more carefully to me, I guess.

Senator CHAFEE. The testimony before the Senate Foreign Relations Committee, Thursday, July 17th—

Senator MITCHELL. Yes, oh yes.

Senator CHAFEE. I do fully believe that ratification of the Conventions and Protocols represents an important step forward because it provides an international solution to what is admittedly an international—well, I don't think we want to base everything on that.

Senator MITCHELL. No. But I think we should make clear that the reason the Attorney General sent this letter dated July 20th, was to clarify the testimony that you just read.

Senator CHAFEE. Well, I've got his letter of July 21st here.

Senator MITCHELL. Thank you.

[The letter referred to by Senator Mitchell follows:]



State of Rhode Island and Providence Plantations
 DEPARTMENT OF THE ATTORNEY GENERAL
 72 Pine Street, Providence, RI 02903
 (401) 274-4400
 James E. O'Neill, Attorney General

July 20, 1989

The Honorable George J. Mitchell
 Majority Leader
 United States Senate
 Washington, D.C. 20510

Dear Senator Mitchell:

I am pleased that the National Association of Attorneys General has taken a strong position on the issue of compensation liability regarding tanker oil spills. As you know, Rhode Island recently experienced a major oil spill in Narragansett Bay when a Greek tanker, World Prodigy, ran aground releasing 300,000 gallons of home heating oil.

While we were extremely fortunate by the circumstances surrounding the spill, damages are still being assessed. In testimony before the Senate Foreign Relations Committee last week, I explained that our main concern in the future will be making sure that Rhode Island receives full compensation.

The resolution passed unanimously by the National Association of Attorneys General fully articulates my position with respect to oil spill liability. Certainly, an international solution is needed for this international problem. Importantly, however, there is a critical need for flexibility in any federal mechanism to provide for a state response to environmental tragedies such as a major oil spill.

The Senate Subcommittee on Environmental Protection will hold hearings tomorrow on the issues of compensation liability and state pre-emption. As Chairman of NAAG's Ocean Pollution Subcommittee, I would greatly appreciate your assistance in conveying my opposition to any measure which would pre-empt individual states from adopting strict liability laws to ensure that they are fully compensated in the most expeditious manner possible. It is my intention to introduce legislation in the

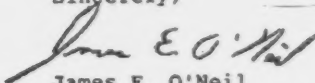
The Honorable George J. Mitchell
July 20, 1989
Page 2

next general assembly session which would allow Rhode Island to establish an oil spill contingency fund patterned after the existing law in the State of Maine.

There are many measures being considered by the United States Senators and Representatives and it is my hope that this Congress will enact a comprehensive federal law to strengthen safety requirements on oil tankers; while at the same time, incorporate the concerns documented in the resolution put forward by the National Association of Attorneys General.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "James E. O'Neil", is written over a horizontal line.

James E. O'Neil
Attorney General

JEO/clb

Senator BAUCUS. Senator Lautenberg.

OPENING STATEMENT OF HON. FRANK LAUTENBERG, U.S.
SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I ask unanimous consent that my opening statement be inserted in the record.

Senator BAUCUS. Very good. Do you have a letter from the Attorney General of the State of New Jersey also?

Senator LAUTENBERG. No, I don't. He relies on me.

[Senator Lautenberg's statement follows:]

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE
STATE OF NEW JERSEY

Thank you, Mr. Chairman.

At last week's hearing, a word we kept hearing, over and over again, was "lucky." We were lucky that things weren't worse. It appeared that luck was all that was keeping us from catastrophe.

But luck isn't something we can depend on. We need to do what we must to prevent spills, and then respond to them when they happen.

We need better contingency planning. We need an oil spill liability fund. We need tighter standards on tankers and those who operate them.

The *Valdez* showed us how inadequate our response systems are. But while the *Valdez* was an extreme case, spills happen every day, in waters all around this country. In one seven-year stretch, we had 102 serious tankers incidents on the Delaware River alone.

And the outlook is more of the same. Oil imports are reaching all-time highs. Almost 50% of our oil is coming in from abroad. That means more tankers. And unless we act, it will mean more spills.

There are things we can do. Some of them are within the jurisdiction of this Committee. Some are not. But the Congress as a whole must get on with the task.

First, we need an oil spill liability fund. In Alaska, the spiller was a major American company, with deep pockets. And so far, Exxon has agreed to pay for its mistakes.

But that won't always be the case. That's why Senators Mitchell and Baucus and I introduced S. 686, which would establish a \$500 million compensation fund, and more than triple the liability of tankers like the *Valdez*.

Second, we need to improve local contingency planning. As Secretary Skinner said at a previous hearing of this Subcommittee, the Alyeska plan was a "zero" on a scale of 1 to 10.

We should have known that before March 24. There should have been regular review and critique of that plan, and of contingency plans around the country. If they're not good enough, they should be changed. And until they are, nobody does business there.

I've introduced legislation to require Federal review and approval of local contingency plans. It would require regular field testing of those plans, to ensure that a plan is worth the paper it's written on. It should be a part of any legislation we approve.

Third, we need to ensure cost recovery. Up in Alaska, 4 months after the spill, we've still got a virtual full-scale military operation going. It's draining and diverting limited resources. The responsible party there, as at other spill sites, should bear the costs of that wear and tear, not just the extraordinary costs associated with cleanups.

Fourth, we need better cleanup technology.

Yesterday, we celebrated the 20th anniversary of men walking on the moon. We've sent probes out to the edges of the solar system.

But then we see men and women scrubbing oil off of rocks with paper towels. It just doesn't make sense.

My bill calls for a review of our technology, and a plan for improving it. This is an important area, and I hope the Committee will address it in its bill.

Fifth, we need to try to control human error. There's the issue of pilotage. The Congress has passed legislation requiring a Federal licensing system for truck drivers and railroad engineers. But tanker harbor pilots, controlling millions of gallons

of hazardous cargo, don't face this requirement. The Federal government doesn't hold them accountable. Maybe we should.

And we should make sure the Coast Guard knows if someone's got a history of drunk driving before he's put at the controls of a thousand-foot tanker.

And when we let a foreign tanker come into our territorial waters, how do we know if the people at the helm are qualified? How do we know if they've got the right charts and the right experience?

Sixth, we need safer tankers. Double-hulls? Maybe. And what about the size of tankers entering our ports? The bigger the ship, the larger the potential spill. Maybe we should force them to lighter off-shore. Maybe that's a good approach; but let's put it into the equation, and see if it makes sense.

Mr. Chairman, there's an old saying that goes, "if it ain't broke, don't fix it." Well, our oil spill response system is broke. And we should be looking hard at all ways to fix it.

Senator LAUTENBERG. Mr. Secretary, I'm pleased to have a chance to discuss a couple of the problems that I see.

I'd like to get to the more practical aspects of the problem, and that is to try to define a way to establish a process that gets to the task in timely and efficient fashion. I couldn't help note the fact that Exxon was able to get lots of socks in a hurry, 100,000 pair of socks. I assume that they're equal pairs. But that's quite a thing.

I was up in Valdez just a couple of weeks ago. We got off on a small landing craft on the beach, these cobbled beaches, and slipping all over the place because they're still thick with oil, now this is more than three months later; people with hand towels—in the celebration of 20 years of the Apollo shot, and here we are cleaning up oil with hand towels—and without being able to assess the success or failure of this cleanup effort. Obviously we're gaining on it, the question is how much are we gaining on it.

I'd ask you this, Mr. Secretary, you gave the Alyeska contingency plan a pretty low mark. I guess zero on a scale of one to ten, so that's even off the scale. Why didn't we know that before the spill happened, that they're planning was so poor and so inadequate?

Mr. SKINNER. First of all, the plan was devised several years ago, and had never been really tested. It had been validated and approved by the State of Alaska, which had the primary responsibility under the law. And it called for certain resources to be available, and they were not checked. I think what happened, and I think to some degree we were also responsible, but we assumed the State the Alaska, as the primary party responsible, would do the proper job of supervising that plan. The question comes up is, should the Federal Government go into, and "preempt" State action and go in and oversee. What steps should they take when a State is failing to fulfill its responsibilities? That is a question that we have traditionally deferred from and gone with the States. I don't think there's any question now, that based upon what happened there, we have to make sure that those State plans are in place.

The plans on the spill in your area, and the spill up further north, as well as the one in Houston, were also State-approved plans and locally approved plans that went into effect with the State and Federal Government working together. So, I think as there had been no spill there in some 20 years, other than the one 5,000 gallon one, and everybody got very complacent. Not only did they not look at the plan, but they also didn't look behind the plan and make sure that the resources that the plan said would be

available were in fact available. And that's primarily the State of Alaska's responsibility. I think the Federal Government has some responsibility there, and should have also double checked it.

Senator LAUTENBERG. I assume in the debate over preemption that a way can be found, and I'd ask the Majority Leader this question, though he's not on the witness stand. Can we write legislation with such character that whatever the toughest requirement is becomes the guideline or the benchmark for condition?

Senator MITCHELL. Yes, of course, we could, but that's unacceptable to the Administration, because you see—

Senator LAUTENBERG. Yes, but I'm not asking them, George.

Senator MITCHELL. Oh, yes, certainly we could, yes.

Senator LAUTENBERG. Thanks. We can get the Secretary turned around, I think.

Mr. SKINNER. I'd like to hear Senator Mitchell's further response here.

Senator LAUTENBERG. No, no. You're not off of it yet.

One of the things that we have to assume, and I'd ask your either confirmation or denial, and that is, does the Coast Guard have the technical expertise to review contingency plans and to rank them, or rate them, according to their effectiveness?

Mr. SKINNER. We have the technical expertise, I'm not so sure we have the quantity. It's a matter of resources. This allows me to make a pitch that I've made to you, and that I know you're sympathetic to, is that as we add additional responsibilities to our organization, we have to make available the proper amount of resources. And you have been very creative in some of the things you've suggested in the last several weeks to deal with that issue.

Can the Coast Guard do it, yes. There's legislation that you have suggested that makes the Federal Government responsible for contingency plans. But I don't want to take responsibility, if I'm not going to have the resources. We just compromise somewhere else, for example we cut back on vessel traffic services. As you know, you now would like, as with other places, for us to implement that back in, but where do we take it away from, contingency plan review? Do we take it away from the 100 or 500 people I have in Alaska? I can only do so much and the Coast Guard has for the last several years been kind of the stepchild of this budgetary process. So, we'll take a hundred million more away from mass transit and put into the Coast Guard area.

Senator LAUTENBERG. Mr. Secretary, I hope you'll make that case to the President at the earliest opportunity about funding revenues for these important projects.

But in the interim I wonder, as we devise this plan, whether or not we couldn't say that there's got to be a fee for review and approval services. We're obviously going to be talking about a lot of charges directed, or assessed, to those companies that transport oil. And the majority leader, I thought, had a great suggestion, that is to take the cap off these liability things. If you do it, you're going to pay for it. My view, Exxon, only because they're the example that's most easily understood, I think ought to be charged back, not just for the direct costs, for the overtime, but rather for the personnel costs as they exist on the payroll. I think they ought to be charged for the depreciation of equipment. When you've got the

kinds of resource that we have up there, you're talking about a lot of expense. We have a major military engagement up there, 10,000 people, with boats of every description practically from rowboats on up to the command ship there. What does it cost to maintain those engines? I want to see every nickel's worth of cost assessed to the company responsible, to the polluter.

Mr. SKINNER. Senator Lautenberg, you and I've discussed this, but they are being billed full cost, not incremental costs. So there is a full cost recovery.

Senator LAUTENBERG. So they know that they're under attack—and I say they, I'm talking about that amorphous body of shippers, oil companies, et cetera. There's going to be a cost assessed to these things. Eventually it gets down to the people who buy the material.

Mr. SKINNER. Let me just say, we're not against the user fee concept. We support and encourage user fees. The problem with a user fee concept, the user fee tends to get mixed into general revenues and I never see it again.

Senator LAUTENBERG. No.

Mr. SKINNER. I'd like to see a user fee that I know will be available rather than being used to balance the budget.

Senator LAUTENBERG. We've discussed this, and a dedicated fund in my view ought to be just that, dedicated, ought not to be included in the budget calculation either.

Maybe Senator Mitchell will join with us in that.

Mr. SKINNER. I appreciate it. Do you want to put that question a second time? I didn't hear the Senator.

Mr. SKINNER. Let the record reflect he smiled but did not nod.

Senator LAUTENBERG. I'd like to ask, Mr. Chairman, that the record be kept open for questions to be submitted to the Secretary, and I'm sure that he will respond promptly and efficiently to all of those.

Senator BAUCUS. Yes, the record will be open. I have no further questions, Mr. Secretary, but I think the Leader has a couple of questions he'd like to direct to you.

Senator MITCHELL. I'll be brief, Mr. Chairman, because I know there are other witnesses, and the Secretary is very busy. I wanted to ask in just two areas, one on limits of liability.

Mr. Secretary, it's my understanding of the Protocols, that they would channel all liability to the vessel owner and remove any other person—

Mr. SKINNER. Yes, that's correct. The vessel owner would sue the other liable parties in a recourse action.

Senator MITCHELL [continuing]. From responsibility, and that the limit of liability on the vessel owner would be \$78 million.

Mr. SKINNER. That's correct. The tanker limit is \$78 million.

Senator MITCHELL. Approximately, based on exchange rates with respective special drawing rights, and that the total limit of liability per incident, including the \$78 million would be approximately \$260 million.

Mr. SKINNER. That's right.

Senator MITCHELL. At which time the fund would be completed. In other words, the liability would be a max of \$260 million.

Mr. SKINNER. That's right from the international fund. Of course, recovery under the domestic fund for environmental damage, with Presidential waiver, is unlimited.

Senator MITCHELL. Now, my question to you is, you having been in Alaska, you having stated here this morning that we agreed that—we had expressed the same view that the damage could be as much as a billion dollars, do you regard a total limit of liability of \$260 million as adequate for possible oil spills in the future?

Mr. SKINNER. For all oil spills, no. For a majority of oil spills, yes. Is it as much as I would like to get in international negotiations, no. Is it a reasonable compromise, yes.

Senator MITCHELL. But if another spill occurred of the magnitude of Alaska, and there were a billion dollars worth of damage, the total amount of liability available to those persons injured by the spill, the total amount of compensation would be \$260 million?

Mr. SKINNER. Yes, the total liability under the Protocols would be \$260 million. Then you would turn to the domestic fund.

Senator MITCHELL. All right. Thank you.

Now, just one other question.

Mr. SKINNER. Well, then the domestic fund would get into place.

Senator MITCHELL. Now, the question of United States contributions to a fund. You said in response to an earlier question from me, that the United States would be a small contributor to an international fund, one of the arguments being that others pay into it. You also said, in response to Senator Chafee's question, that other countries are waiting to see what we do, and while he disputed it, you're obviously correct, and the reason they're waiting to see what we do, Mr. Secretary, as you well know, is that we would be a large contributor to the fund. Am I not correct that under Article 12 of the Fund, contributions by each member nation would be based upon the amount of oil received in that nation in the preceding year?

Mr. SKINNER. Yes. I asked that question yesterday, about 25 percent of the international fund would be generated by the United States, or about \$8 million annually.

Senator MITCHELL. One-fifth of the total fund——

Mr. SKINNER. Right.

Senator MITCHELL [continuing]. Throughout the world.

Mr. SKINNER. Right.

Senator MITCHELL. I thank you, Mr. Secretary.

Mr. SKINNER. Thank you.

Senator MITCHELL. Thank you very much, Mr. Secretary, I really do look forward to working with you.

Mr. SKINNER. I look forward to working with you, Senator Mitchell.

Senator BAUCUS. Thank you very much, Mr. Secretary.

All right.

The next panel consists of Mr. James Tierney, Attorney General of the State of Maine; Doug Bailly, Attorney General of the State of Alaska; and Mr. Ken Eikenberry, Attorney General of the State of Washington. Unfortunately, we do not have the Attorney General from the State of Rhode Island.

Senator CHAFEE. But we've got his letter.

Senator BAUCUS. Senator Mitchell, do you want to introduce your Attorney General?

Senator MITCHELL. Thank you, Mr. Chairman. I'm pleased to present to the committee the Attorney General of Maine, Jim Tierney, a close personal friend of mine, an outstanding Attorney General, someone who's served the people of Maine with great energy and effectiveness in that position for many years. He has been intimately involved in the Maine legislative program on oil spills, I believe is a national expert on this subject, and I particularly welcome his testimony.

I have not met the other gentlemen, but I know we look forward to their testimony as well. Mr. Eikenberry's I know we look forward to hearing, because I read his testimony and he agrees with me. So that right there is one reason to look forward to his testimony. Thank you, Mr. Chairman.

Senator BAUCUS. Mr. Tierney, why don't you proceed. Before you begin, let me say that I've been very lax in observing the time limits with the previous witness and during the previous question period. I will not be so lax from now on. We have many witnesses yet to testify. It's now after 11 o'clock, so I will restrict each to five minutes. I encourage each of you to submit your full statement for the record and summarize the main points of your testimony as best you can during that five minute period.

Mr. Tierney.

STATEMENT OF JAMES E. TIERNEY, ATTORNEY GENERAL, STATE OF MAINE

Mr. TIERNEY. Thank you, Senator. Thank you for your kind words. It's nice to be back before this committee. I testified on this precise issue in 1986, and not much has changed.

The policy positions have not changed. The issues have not changed. The only thing that's changed is we've lost several hundred miles of our Nation's coastline due to an environmental disaster the proportions of which we cannot yet calculate.

I am here to testify in favor of Senator Mitchell's bill. It provides the resources we need for quick response, strict liability, and it does not preempt our legislation. I submit for the record the much discussed letter from the Attorney General of Rhode Island, in which he agrees with a NAAG resolution, which I would also like to submit for the record. That resolution explicitly opposes the Protocols, and explicitly calls for national legislation in this important area.

For 9 years I've been counsel to the Maine Coastal Protection Fund. It has been an enormous success and it works. It provides for costs, damages and loss of income, but more importantly, it provides for joint, strict and several liability, which I firmly believe is essential to the successful operations of any State law. There is no place for trying to formulate the intent and the complexities which a lack of that kind of liability implies. There's been no loss to the State of Maine for the 18 years that we've had this statute. The oil tankers come, the oil tankers go, they deliver their product to the people of Maine, and I believe they're doing it with increasing amounts of safety. Seventeen other States have followed our lead.

And I believe that it is essential that this Maine law be continued and it not be preempted. It is axiomatic in Federal environmental policy that the Federal Government establishes minimum standards—not maximum standards in clean air, clean water, and hazardous waste laws. And yet, the Protocols that have been mentioned do exactly the opposite.

With all due respect, the good Secretary of Transportation is wrong. A vote for the Protocols is not a vote for the environment. The Protocols under the guise of foreign policy deeply intrude into domestic environmental issues. They lack strict liability. The limits are too low. They are a lawyer's dream. It places the burden on the wrong people. It focuses the issue on the ownership of the vessel, instead of the ownership of the oil. It fails to provide for full restoration of our environment, and it leaves the issue of third party liability vague at best. It is not in this Country's interest to adopt these Protocols, and I call for their renegotiation.

And then finally, if I could add a personal note. Yesterday, just 24 hours ago, I was in the deepest part of the wilderness of our wonderful State, the State of Maine. I was there with my wife and my three youngest children. In order to be here I hiked out a full 10 miles and I came by boat the last couple of miles. And for most of that trip I carried on my back my infant daughter. Kate is five months old. She's too young to walk. She's too young to talk. But yet she relies on my wife and my other children to take care of her. She doesn't question that reliance, and neither do we as her parents. It is fundamental to the human experience that we take responsibility for each other and for what we do. We don't duck, we don't hide, we don't run away, we don't set up smoke screens. We take responsibility.

And yet, Senators, the reasons I'm here today is so that the oil industry must be held to that same fundamental human standard. Their repeated attempts to avoid responsibility is wrong. They've erected barrier after barrier, called arrogant by the State of Alaska, to protect their own bottom line. The bottom line for the people of America is protection from environmental damage. And I'm here to urge this committee, long the conscience, the environmental conscience of this Congress, to stick to your guns and to take responsibility. The oil industry has not, the House of Representatives has not, and the President of the United States, who claims a piece of our coast is the most precious piece of real estate in the world to him, also has not been willing to take responsibility to protect it.

This may not be an easy job for you. I understand the pressures being placed on you. But it's the right thing. And if this committee does the right thing, I believe firmly that the American people will rise up and stand behind you. We will protect our coasts, and we will protect our heritage.

Thank you.

Senator BAUCUS. Thank you, Mr. Tierney, for an excellent statement and for keeping to the allotted time.

Mr. Bailly.

STATEMENT OF DOUGLAS B. BAILY, ATTORNEY GENERAL, STATE
OF ALASKA

Mr. BAILY. Senators, I'm enthusiastic about this, which is my first opportunity to address a committee of the Congress. And I must say, I've been quite impressed by the obvious detailed knowledge that this panel has, and as I learned last night and yesterday in my preparation, that the staff that many of you have on this issue. I apologize for the fact that it surpasses my own technical knowledge in this area.

However, events since Good Friday when in Captain Hazlewood's words, "The *Exxon Valdez* fetched up hard aground on Bligh Reef", creating the largest oil spill in the history of the United States, my time has been largely monopolized by other issues, other than such a detailed study of the Protocols as I wish I had been able to complete. However, my review has led me to believe that both the Federal Protocols or other efforts at Federal preemption would have seriously and adversely impacted Alaska, and Alaskans in their efforts to respond to the problems that we've had in recent months.

The limits of liability, the compensation cap, which I understand to be in the vicinity of \$260 million, is woefully inadequate, at least for an incident of this type. Just yesterday morning, yesterday afternoon, I guess, Mr. Stevens of Exxon Corporation testified before a committee of this Senate, that his corporation has to date spent \$600 million. Essentially all of that thus far on cleanup efforts alone, or what now Exxon and the Coast Guard have recharacterized not as cleanup, but as treatment of the beaches in Prince William Sound, a new terminology that entered the lexicon of oil spills yesterday.

I believe that only a—what is presently our patchwork system of State laws, including those in place in Alaska, whereby the owners of the oil have responsibility to the full financial extent of their resources has prodded Exxon corporation to fulfill the steps that it has taken in Alaska. And I greatly fear that had the Protocols been in place and applicable that Exxon's presence would have disappeared a long time ago, and that it would have provided to them an escape hatch from a sinking ship.

In some cases it's clearly my understanding that they might improve the recovery. Those circumstances are apparently slim indeed. But I fail to perceive a legitimate public policy basis for the United States in the 1990s accepting the lowest common denominator in that recovery and in that solution to a difficult national and international problem.

The supporters of the Protocols, argue, among other things that they provide a rapid response. I can tell you that faced with the present laws in Alaska, that Exxon Corporation, and I will laud them where I think they should be lauded, and I will criticize them where I think they should be criticized. But within weeks they were paying claims to many commercial fishermen in Alaska, claims as early as the start, the beginning of what would have been their season, had those seasons not been closed. And that, I think, was the substantial pressure that Alaska law provides.

I would like, finally, to make a couple of observations that perhaps are beyond the scope of what the discussions have been here today. I believe that compensation is a critical issue, but I don't think it's by any means the sole issue. I'm sure you agree. I recently saw a statement by Steven Wolfe, who is the President and Chief Executive Officer of United Airlines, and he stated that the cleanup of oil on beaches makes dramatic television news. Less dramatic but even more critical to life on this planet is the quiet process by which environmental planning is built into the business strategy of the world's corporations and national economies. And I don't believe we have yet found the final answer in how that will be done. I am concerned that should we adopt the Protocols that we will put ourselves in a strait jacket which will make it much more difficult when, if and when, a better answer is found.

Senator BAUCUS. I have to ask you to summarize, please, Mr. Bailly.

Mr. BAILLY. Sure.

Finally, I will summarize very briefly, or will conclude. Alaska is concerned about it's environment. Alaska is also an oil State. We are very much an oil State, and we are in the oil business. And if we are to continue with other States to gather the public respect and confidence in the system of producing and transporting oil, that we must have, then we have to have a full compensation system in place. It's shortsighted in my view, on the part of other States, and the businesses, entities, that are in the oil business to try and obtain temporary safeguards that will foreclose their futures to public opinion.

Senator BAUCUS. Thank you very much.

Mr. Eikenberry.

STATEMENT OF KENNETH O. EIKENBERRY, ATTORNEY GENERAL, STATE OF WASHINGTON

Mr. EIKENBERRY. Mr. Chairman and members of the committee, it's a privilege to be here and watch your efforts at balancing protection of the environment with our reliance on petroleum. And it's in that perspective that I would like to summarize the 14 pages of statement that I've submitted to you, by stressing one aspect.

And that is our belief that any scheme that you settle on must include the concepts of deterrents and being sure that we place responsibility on those who cause the spills to occur. And I'd like to do that by referring to one particular example, and let that make my point.

In my statement I've referred to spills that happened in our State last December, and then January of last year, but I'd like to go back to December of 1985, when the *Arco Anchorage*, which is an ocean-going tank vessel, which would come under the Protocols if they were in place, was coming from *Valdez* to Cherry Point in Washington State, but along the way pulled in to simply stay over until a berth opened, stay over at Port Angeles. There was a pilot on board, as required by law, and the master was on board, both of them at the bridge of this vessel, which drew 50 feet draft, but unfortunately entered into an area that had only 48 feet of water.

And the result was a spill of some 239,000 gallons of North Slope crude.

Now, Washington State has a scheme of laws that do impose very strict joint and several liability. We think that had a lot to do with the dispatch with which the company entered into an immediate cleanup effort, paying for the damages that occurred to the sum of about \$14 million. In addition, the State imposed a \$30,000 penalty on the pilot, and a \$30,000 penalty on the master. And we've made it stick. We think this combination of laws and circumstances provided for a speedy cleanup, it shared the risk where it deserved to be shared, and it will achieve deterrents for the future.

However, if the Protocols had been in place, any liability, any possible liability for damages as against the pilot or the master, or if a charter had been involved, or a salvor, or any of the others that you're fully aware of, had been involved, we would be totally cut off from recovering against those kinds of people. Very arguably we would have been cut off from imposing penalties if the Protocols were in place. We question, under the Protocols if they were in place, as to whether we would have been able to recover for the cost of natural resource damage, and especially if restoration had been impossible.

And finally, if the spill had been a catastrophic one, and went above the \$260 million amounts that have been mentioned earlier, we think that with the Protocols and their impossibly high burden, so far as piercing those limits of liability, that we would have been in an absurd situation, because the Protocols call for a personal, reckless, intentional act with knowledge of the damage that will follow, as contrasted with the kind of burden that's being talked about in legislation proposed by members of this body, which would call for willful misconduct or gross negligence, which we think is a much more reasonable standard.

With that, example, members of the committee, we hope to illustrate that this sharing of responsibility is how it should work and that these spills should not simply become a cost of doing business, which is what we think would happen under the Protocols.

Senator BAUCUS. Thank you, gentlemen.

Mr. Leader.

Senator MITCHELL. I'd like to ask each of the panel, first, I understand from your testimony, just to make it crystal clear, each of you is opposed to United States ratification of the Protocols, am I correct?

Mr. TIERNEY. That's correct, Senator.

Mr. EIKENBERRY. Yes.

Senator MITCHELL. Mr. Baily?

Mr. BAILY. That's correct.

Senator MITCHELL. Mr. Eikenberry?

Mr. EIKENBERRY. As is the National Association of Attorneys General by virtue of a resolution passed just last week, Senator.

Mr. TIERNEY. Unanimously.

Senator CHAFEE. The question was were they were unanimously opposed to ratification of the Protocols?

Mr. TIERNEY. That's correct, Senator.

Senator MITCHELL. Now, do you regard the limits of liability under the Protocols, \$78 million on the vessel owner, and maximum per incident liability of \$260 million as adequate? Mr. Tierney?

Mr. TIERNEY. Senator, \$78 million wouldn't clean up Kennebunkport.

Senator MITCHELL. Mr. Bailly?

Mr. BAILY. It's been proven in the *Exxon Valdez* incident to be inadequate.

Senator MITCHELL. Mr. Eikenberry?

Mr. EIKENBERRY. Absolutely not, Senator Mitchell. If one of these spills had occurred out in the open straight where the current strewn this along the coastline, we can see the dollars running well beyond those limits.

Senator MITCHELL. Mr. Eikenberry, in your written testimony you discuss the problem with the Protocols of the limited coverage of natural resources. You alluded just briefly to it in your remarks. Could you just take a moment to expand on that please, as to why your opposition to the Protocols includes its provisions regarding natural resources damage?

Mr. EIKENBERRY. Because of the limiting language as to the kinds of efforts that may be imposed in cleaning up; because of the question about what may be recovered if it isn't possible to clean up, or if it's not even possible to restore species that may have become extinct because of the spill that has occurred, we think the limitations are unreasonable for those Protocols.

Senator MITCHELL. Are either of you familiar enough with that issue to want to comment on it? Mr. Bailly?

Mr. BAILY. I would concur.

Senator MITCHELL. Mr. Tierney?

Mr. TIERNEY. I would agree, Senator, and take the next step, if I might, dealing with some of the human resources. There's a good friend of mine from Harrison, Maine who's currently a mental health worker in the State of Alaska, and she reports to me the human costs in terms of depression, and inability to face daily life and the result of this spill is very profound and very deep. The key is keep these tragedies from ever happening, and that's why I believe that your bill goes much further than anyone else's.

Senator MITCHELL. I thank you all very much for your very persuasive testimony.

Senator BAUCUS. Thank you, Senator.

Mr. Tierney, I want to follow up on your last point. Senator Stevens mentioned to me, it's like a war zone in Alaska, the depression, the psychological effect of the spill, let alone all the economic loss, the commercial loss, the environmental loss, is staggering. It struck Senator Stevens very strongly how much the people were affected there, occurring as great a psychological loss as well as the other losses. That's an excellent point and I'm glad you made it.

We've been so far discussing and concentrating on the liability that States oppose as a leverage tool to help secure recovery, and also the degree to which it's probably a deterrent. I think those are excellent points. I wonder if I could also now focus on the other side, that is any problems that States have in securing judgments, limitations on damages or forcing judgments either actual or physi-

cal, either actual or theoretical, under current law that perhaps would be alleviated by the Protocols. Mr. Tierney?

Mr. TIERNEY. Well, certainly not, that would be alleviated by the Protocols. To the contrary, they would create a litigation morass from which no State or no personal corporation could emerge. That's the purpose of strict liability: it means the responsible parties can fight it out for years to come among themselves in terms of what proportion—

Senator BAUCUS. So, as the Attorney General from the State of Maine you could not think of a circumstance under which the Protocols would better enable people in the State of Maine to secure more appropriate recovery.

Mr. TIERNEY. That is correct, Senator. I've been the Attorney General for nine years, and Maine was one of the first States to pass this law. So I have long experience in it and feel very strongly.

Senator BAUCUS. Thank you.

Mr. Baily.

Mr. BAILY. None in our experience thus far, Senator, and on the basis of information that's come to my attention, none that would impact Alaska in the foreseeable future. As to other States, I have had none called to my attention.

Senator BAUCUS. That is if a foreign ship were to discharge oil in Alaska waters, you have no problem in—

Mr. BAILY. It's not occurred at the present time.

Senator BAUCUS. OK.

Mr. Eikenberry.

Mr. EIKENBERRY. Mr. Chairman, I can think of—well, we have a situation, whether it was a spill from an inland barge, but if it were a seagoing barge coming under the Protocols, we would be even more handicapped in some litigation we have going on now where the owner has gone into bankruptcy, the charter owner, who we are going after, is seeking to limit his damages to the cost of the recovered barge, which is a mere \$9,000, and under the Protocols we wouldn't even be able to talk to that charter owner about liability. So we see big problems.

Senator BAUCUS. Again, just to point out that the resolution passed by the State Attorneys General was unanimous not to ratify the Protocols?

Mr. TIERNEY. That's correct.

Mr. EIKENBERRY. Yes.

Senator BAUCUS. Thank you.

Senator Chafee.

Senator CHAFEE. Thank you, Mr. Chairman.

Mr. Tierney, what do you do in a situation where a Liberian tanker is coming up Penobscot Bay and hits a rock and sinks with 100,000 barrels of heavy crude in it? What do you do then?

Mr. TIERNEY. Well, first of all, Senator, if it's coming in Penobscot Bay it's probably coming up to Bucksport and it's going to leave some fuel, which will be used in the State of Maine, which means it's clearly subject to our State law, in addition to Federal law. The first element of Maine law is that that tanker and those who own the cargo in that tanker are fundamentally and primarily responsible for that cleanup. If they do not—

Senator CHAFEE. Yes, but it's a Liberian tanker that has a paper trail——

Mr. TIERNEY. We have equipment, Senator, located in Penobscot Bay, which is owned by the State of Maine which is there today and ready to go within hours, within less than an hour to start to contain that spill, to move quickly, as was not done in the Alaska situation. We own it, we operate it, we run it, we periodically test it to make sure it's operational. Such a test has already been scheduled to take place this fall.

Senator CHAFEE. Yes, I wasn't concentrating in that part, and I'm sure you do have a good response system and I commend you for it. Who do you seek damages from? The tanker is sunk, it's got one of these intricate paper trails that you never find anybody at the end of.

Mr. TIERNEY. The cargo, the owner of the cargo, Senator. That's the purpose of joint and several liability is that you can follow it up that trail that you don't get blinded by the simple owner of the vessel.

Senator CHAFEE. Let's say that somebody in Bucksport is purchasing the cargo on delivery. As of now it belongs to somebody off in Europe somewhere. So that the person in Bucksport doesn't yet own it. So, who do you go after?

Mr. TIERNEY. Someone owns that fuel, Senator.

Senator CHAFEE. Well, the fuel——

Mr. TIERNEY. Is that owned by Liberia as well? I don't think that's the way the industry works.

Senator CHAFEE. The fuel is distributed across Penobscot Bay by now. And somebody in Europe——

Mr. TIERNEY. Of course, we have——

Senator CHAFEE. Let's take Bulgaria.

Mr. TIERNEY. Well, Senator, we have a fund——

Senator CHAFEE. The oil on the World Prodigy not spilled off Rhode Island, came from Bulgaria.

Mr. TIERNEY. Well, of course, we have a fund, as I stated in my testimony, that takes care of the costs, the immediate costs, provides reimbursement to the fishermen who have lost their jobs, provides for the equipment, we own it already, it's been purchased from this fund. So we have a funding mechanism which does the initial job, and then the rest will be left to litigation.

Now, if you're asking can you construct a hypothetical situation where there are some situations where with the innocent bypasser that you can't get there, yes you can. There are some exceptionally small percentages that under the current of patchwork of laws, we cannot get to. But I say, Senator——

Senator CHAFEE. I'm not really trying to set up an impossible hypothetical, because I think that, one, we're going to see more and more oil imported in the United States if present trends continue. Secondly, it's a fact that so much of this oil is carried in foreign-flag vessels, and I worry. The Alaska situation is somewhat different, because in Alaska the tankers are all American flag tankers by dent of the law that says the only tankers that can take that crude has to be U.S.-flag, so it's a different situation. You're going to have somebody responsible there. But I worry about—if you don't worry, then that's fine by me. Either the State of Washing-

ton, or Maine, or Rhode Island with these vessels coming in that have these strange backgrounds.

Mr. TIERNEY. Well, Senator, I'll make it very clear that I'm very worried that this Country does not have sufficient comprehensive oil spill testimony. That's one thing that everyone agrees on, including the Secretary of Transportation and all of us in this room. We feel that we do not have adequate protection. That is why I am here. That is why my National Association passed a resolution not just opposing preemption, but strongly endorsing that this Congress take strong action to provide the kind of comprehensive statute that would take care of that situation.

Senator CHAFEE. Okay, fine.

Senator BAUCUS. Thank you.

Senator Lautenberg.

Senator LAUTENBERG. Yes, very briefly, Mr. Chairman. Thank you, and thank you to the Attorneys General who appear here.

Each one of your States has a coastline that's precious to you, as we are in New Jersey. New Jersey has an enormous amount of coastline compared to landmass. We're surrounded by water on three sides, and just the very narrowest northern border is a land border. New Jersey has, as you may know, a spill fund, one of the 24 that does, and that fund is essential to respond to incidents in our State which has a significant oil industry. We're the largest chemical producing State by way of numbers of employees. No State has a larger employment base in chemicals. That fund is fueled by taxes on hazardous substance generators and handlers.

Everybody is looking at the Protocols and trying to figure out why we shouldn't do it, and I don't know why we're talking about doing something to engage us in that relationship. But in your opinion would the New Jersey spill fund be preempted by the adoption of the international Protocols sought by the Administration's bill?

Mr. TIERNEY. Oh, I don't think there's any question, Senator. Certainly under Milwaukee versus Illinois and the general plain face wording of the Protocols that all of the State statutes such as you have in New Jersey would be preempted.

Senator LAUTENBERG. Well, under those Protocols would the State be able to turn to the Federal Government for relief in any way, or would that be also preempted?

Mr. TIERNEY. Well, there would be, under the Protocols, there would be what I would characterize as a shell of protection. I think it's inadequate. But there certainly would be response teams still available. But what you lose is your own ability to bring potential violators into State court. You lose strict liability. You are saddled with liability limits which are far too low. All of those issues. You run afoul of the problem of the judgment proof vessel, and let a larger section of the oil industry who actually owns the cargo goes free. All those things would happen in New Jersey, as it would with Maine.

Senator LAUTENBERG. If we had the capacity to establish a national oil spill fund, do any of you see your own States needing it's own spill fund continuing, or might there be a point at which we say, ah ha, we don't have to do that, the Federal Government is

going to provide us with the financial resources to recover or prevent, et cetera?

Mr. EIKENBERRY. Senator, I really do encourage the notion of States being able to initiate action, States being able to maintain funds of this sort, that we have a partnership relation with the Federal Government in protecting the environment, because our experience with regard to the Clean Water Act, with regard to other areas, air pollution, is that that kind of relationship works for the better.

Senator LAUTENBERG. The concept of the State oil spill fund is one that ought to be in place in terms of your judgment?

Mr. TIERNEY. Yes. Speaking only for Maine, Senator, I think that we would maintain our statute, even were this Congress to pass legislation such as Senator Mitchell's or Senator Lieberman's. I think it's important that you do so, and I think that we not, in all these discussions about the Protocols, forget that it's fundamentally this Congress's responsibility to fashion national, domestic environmental policy, which is what this is all about. The Protocols, in my opinion, are simply a ruse to take us away from that. When the oil industry was unable to find advocates within this institution, your institution, to fight their fight for them, they went to the Protocols group, and I think that's fundamentally wrong, and we should get it back where it belongs, which is in this room.

Senator LAUTENBERG. Thank you, gentlemen. Thank you, Mr. Chairman.

Senator BAUCUS. Thank you, Senator. Thank you, gentlemen, very much for your testimony.

Our next panel consists of Mr. Dennis Kelso, Commissioner of Alaska Department of Environmental Conservation, and Mr. Thomas Jorling, who's the New York Commissioner of the Department of Environmental Conservation.

Thank you, gentlemen, for taking the time to give us your views. Welcome back, Mr. Jorling. You've been before this committee a few times before. We appreciate your testimony, and also Mr. Kelso. Mr. Kelso, why don't you proceed?

STATEMENT OF DENNIS KELSO, COMMISSIONER, ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Mr. KELSO. Thank you, Mr. Chairman. My name is Dennis Kelso, and I'm the Commissioner of the Alaska Department of Environmental Conservation. I'd like to thank you for the opportunity to share our views with you today. Frankly, we're encouraged at the attention you're giving to these matters. They are, from our prospective, crucial. Obviously, our experience in the past three months, or four months now, has given us an intense lesson in how all of this fits together, or should fit together. We'd like to share some of our observations, and we'd like to work with the committee as you proceed in evaluating legislation.

One of the themes that appears in the legislation, and something that I'd like to speak to a bit today, is oil spill contingency planning and carrying out of those plans in the event that there's a spill. With your permission, Mr. Chairman, I will just submit my written testimony and I will really deviate from that and try to get

into a little more depth on this particular area, or a couple of related areas.

Essentially Government is now in a reactive posture, when we're talking about oil spill response planning and the carrying out of those plans. And here's what I mean. In virtually every part of the Country, certainly this is true in Alaska, oil spill contingency plans are developed by the regulated industry, and the State is in a reactive position. We can continue to comment, or continue to require changes in those plans, but essentially the initiative for shaping them comes from the industry rather than from the Government, either State or Federal. Now, what that means is that although we can eventually get a respectable plan, and in the situation that we had in Prince William Sound where Alyeska Pipeline Service Company was responsible for carrying out the oil spill contingency plan, we did have a good plan. It had been revised every three years for the past decade, and the plan that was in effect was revised over a period of about 18 months. But the problem was that's not a very effective way of getting the plan put together. Really, the Government ought to be saying, here are the elements that need to be in the plan, industry can develop a draft based on those elements, but the Government ought to be directing the formation of the plan, rather than reacting and trying to cajole changes in the plan until it reaches an approval of State.

But the other part of it, and in this instance, the really operational part, is that although there was an approved plan, it was not carried out. Alyeska Pipeline Service Company failed to do what the plan required, and Exxon abandoned the plan entirely and just used something else that had not been approved. So essentially, we have to have both of the elements if it's going to work, and the Government, whether it's the Coast Guard or the State, or preferably in this kind of spill, the two working in conjunction, need to be able to direct how those plans are carried out.

I'd like to give you a couple of concrete examples, and I've brought some samples from the oil spill. I'd like to show you a couple of jars of material. The jars that I'm going to pass around here are oil that has been collected on July 15th. I wanted to share it with you because there's a misperception that the spill is somehow over, and that's not the case. It's still happening. New areas are being oiled even now, communities are being hit, fishermen are experiencing impacts every day from this spill. So I wanted to give you a picture of that.

I have another jar here which is oil that was taken during the early days of the spill, and I'd be happy to send that around as well. In the plastic bag, there's been considerable discussion about double bottoms for tankers, you'll see that these are double bagged, and I would encourage you to leave them that way, because it's pretty potent stuff. What you have there is material taken from sort of the far end of the spill. And this is what is usually described as mousse, because it has a sort of consistency like chocolate mousse, although that's a pretty heavy mousse that you see there. Those are mousse patties that wash up on beaches, eventually they weather into tar balls. And that material not only piles up and can pile up six inches to 18 inches deep or more, and it can foul fishermen's gear—

Senator BAUCUS. I have to ask you to summarize your testimony, Mr. Kelso.

Mr. KELSO. I'd be happy to do that. Here's where we stand right now. We have some major issues yet remaining. One of them is that because we have a spill ongoing, we need to have the oil spill contingency planning really deliver what it is that the holders of those plans had promised. And in this instance what it means is, that contingency planning in the future needs to address things like recovery of oil from shoreline and what techniques would be available to do that, handling solid waste. And I have some information about that.

Senator BAUCUS. I have to ask you to summarize even more briefly.

Mr. KELSO. And we need a commitment from Exxon to come back and do the work next year as well as this year, and so far they've been reluctant to do that. Without a position in which the Government takes the lead in directing that cleanup, we don't have a hammer to make sure that the job gets done right.

Senator BAUCUS. Thank you, Mr. Kelso.

Mr. Jorling.

STATEMENT OF THOMAS C. JORLING, COMMISSIONER, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Mr. JORLING. Thank you, Mr. Chairman. I'm pleased to be back here before the committee. I can summarize my prepared statement by saying that my position is very close to the position and the reasoning expressed by the three Attorneys General that appeared before me. I can assure you that the State of New York supports their position.

When the Exxon Valdez incident occurred, New York Governor Cuomo initiated a review of current programs to determine how vulnerable New York would be in a similar incident. And that prompted us to look very closely at the international, national and state oil pollution response regimes. Obviously, we feel we have some elements of an adequate program, but it is clear that the program still needs improvement. The legislation before you indicates that the improvements must be made soon.

When the World Prodigy incident occurred in Rhode Island, we were getting even closer to New York, and therefore the urgency of review became more compelling. And the World Prodigy, right now, is sitting in dry dock in Brooklyn. So these incidents didn't affect New York directly, they did affect us in the sense that we had to review the response regime that exists.

And what I would like to do is bring to you the benefit of that review. Beginning in 1968 with service to this committee, I've been both a participant in and an observer to the continuing struggle to establish an oil spill regime, and now more recently, chemical spill response. The regimes include developing resources and authority necessary to make response prompt and cleanup meaningful. The lessons from Alaska are extremely important, and I certainly think all of us in the business of environmental protection will review them carefully, particularly the need to impose regimes of liability on the parties who are engaged in the marketing of these materi-

als. For most of the period the United States has been a leader in the effort to strengthen oil spill laws, with many States including my own, establishing their own programs. But we are not there yet. And I think the pending legislation indicates that we are not there yet. But we do know that a comprehensive and adequate oil spill program, whether State, Federal or international, must achieve two simple but extremely important objectives.

The first objective is to put—

Senator CHAFEE. Mr. Jorling, can you get to kind of your principal points?

Mr. JORLING. Well, the principal point, Senator Chafee, in the context of this discussion, is that the regime of liability must include the standards of strict, joint and several liability, and that the limits of that liability must be sufficiently high to anticipate the types of circumstances, and all of the circumstances, in which oil might be released. These must be the basic principles.

With respect to the relationship of Federal and State law to international law, we have some serious problems. Obviously, it's appropriate for the United States to enter into an international agreement where there is benefit to be gained from that participation. And I would point to the Montreal Protocol on CFCs as an example of both the United States and the international community agreeing to new initiatives to benefit environmental protection. But in this case the United States' position is more protective than international law. We should not lower our standards as would be the case if these Protocols were adopted.

What we need is a measure adopted by Congress that's very close to the Majority Leader's bill. We would, however, argue that the limits of liability in the majority leader's bill should be increased. But the basic framework that is established in that bill is what we believe is minimally necessary to put the United States into a better position in the event of an oil spill. And that implicitly and explicitly means rejecting the international Protocols.

And with that, I'll be happy to respond to questions.

Senator BAUCUS. Thank you, Mr. Jorling.

Mr. Kelso, do you also agree with Mr. Jorling with respect to the preemption question, that is that the Protocols as presently drafted should not be ratified because they would respect the ability of the States to receive adequate compensation, and it would also tend to prevent the proper incentives from being in place which would tend to prevent spills?

Mr. KELSO. We think it's essential to maintain the States role with respect to liability, as well as spill response and funds to do that.

Senator BAUCUS. So you are opposed to the limitations on State liability that would result in the Protocols?

Mr. KELSO. I think Attorney General Baily has probably described it. Our view is if the State role can be fully protected through reservation language in ratification, then that's acceptable to us. But if it cannot, then we would not be in support of the Protocols.

Senator BAUCUS. Another issue is federalization, the degree to which the Federal Government should take over. Do either of you have a view on that issue? One of the bills before us provides that

the President must take over unless he judges that the cleanup is appropriate and prompt. Do either of you have a view on that?

Mr. JORLING. Well, I think there's a couple of issues that you raised there, Mr. Chairman. I think the important point, confirmed by the Alaskan experience, is that on-scene coordinators must make immediate judgments and that the law should support those judgments. There should be no fear that someone will later charge that a decision to commence cleanup was not reasonable, or that it should have been made differently. The law should support the judgment of on-scene coordinators, whether they're made by a State official in the case of an inland water spill, or a Federal official in the case of a navigable water spill.

Senator BAUCUS. Would the clarification be sufficient that the on scene coordinator is in charge unless he determines otherwise, unless he determines the parties are taking appropriate response?

Mr. JORLING. I think that is an appropriate step, yes.

Senator BAUCUS. How do you resolve the attention between the industry on the one hand, and the Federal Government on the other to develop the contingency plans. The industry feels it knows best, it's closer to the situation, he knows how to develop plans and so forth. Many in the oil and gas industry and the oil transportation industry would like to essentially develop requisite plans. Others feel that's the fox guarding the hen house, they will not be adequate. How do you resolve that tension?

Mr. JORLING. Well, I think the tension has to be resolved on the side of public authority. I think the facts speak loudly that the industry's testament is not correct. They have not responded adequately and the preparations that they have made have not been adequate. Continued industry involvement in the preparation of contingency plans will be necessary, if for no other reason than to understand what the traffic patterns are that are likely to result in a spill. But industry certainly cannot be deferred to in any way, shape or form in the establishment of the response mechanisms that public authorities administer.

Mr. KELSO. Mr. Chairman, I might add, I think by the Government setting specific requirements and content that has to be addressed, and standards to do that, and then asking industry to come back in with a plan that meets those standards we can achieve what you're suggesting.

I'd also like to mention on your previous question, that we support having the Government in the lead role in directing cleanup. And it doesn't mean that the industry wouldn't have a role, but the direction of that ought to be by—in the case of a spill in the waters of the U.S.—by the Coast Guard in conjunction with the State. We each have a role to play, and without both of us there we can't get full expanse.

Senator BAUCUS. Should the Federal Government, in your view, be required to approve those plans, or delegated by the Governments to the States to approve? Do you have a view, either of you?

Mr. JORLING. There are a range of situations for which the State is the only responsible actor including spills to inland waters or to the ground. Contingency plans for those spills have to assign the dominant response role to the states. In the navigable waters I think it's appropriate for the Federal Government to have the final

authority on the content of the contingency plan, but with strong concurrence and participation by the States.

Senator BAUCUS. Thank you.

Mr. KELSO. I would see that concurrence as essential, because it is, after all, the people who live there who are most affected by whether that contingency plan is properly carried out.

Senator BAUCUS. Thank you.

Senator Chafee.

Senator CHAFEE. Thank you, Mr. Chairman.

What I'm most interested in is prevention of these accidents in the first place. The idea of the collection afterwards is important.

Mr. Jorling, on page 5 of your statement you say, the Mitchell bill sets forth strict liability standards necessary to create a prevention mentality by those who traffic in oil products. If I follow the rationale of you and Mr. Kelso it is that the way you're going to get people to be careful is to impose considerable potential liability upon them. That's your philosophy, Mr. Jorling, obviously from this statement. I just wonder whether you reach a point where the energies of the shippers is not devoted so much to prevention as it is to circumventing in some fashion, the potential liability, namely cloaking their vessels in a whole host of corporate veils that are difficult to pierce, that whether it's in Liberia, or Panama, or wherever, they can do these things. Does that concern you?

Mr. JORLING. Yes, it does, Senator. I think what we need are strict standards of liability. Strict joint and several liability is more apt to induce a high standard of care than any other liability regime, because it avoids questions of comparative, contributive, or even absence of negligence. It tells owners and operators that high standards of care are something they must incorporate into their business practices to prevent spills.

Both the Valdez and Rhode Island spills occurred because industry took risks that in my judgment do not under any calculus fall within the standards of care that should be applied by those engaged in the commerce of oil. But you have correctly pointed out that even under the strictest standards, industry may try and find corporate shields or other legal shields to that liability.

With respect to vessels that are coming inside the 200 mile limit, most are coming in to engage in commerce in the United States. Most of them can be reached, no matter how they characterize themselves in legal terms. However those vessels, inside the 200 mile limit that are in innocent passage not destined for a port in the United States do cause problems in the event of a spill. Obviously, an international regime is the best way to reach those ships.

Senator CHAFEE. Well, yes, I agree with you. I think the number that are just passing through are modest compared, obviously to those that are coming here to deliver the oil.

All right, fine. Well, thank you both very much.

Mr. KELSO. Mr. Chafee, I would also leave them on the hook for the cost of cleanup. I think that, whether it's incurred by the State, by the Coast Guard, or by some other entity.

Senator CHAFEE. Yes, we're not debating that. I'm seeking some method here, one to encourage the prevention of these accidents. I just wonder whether solely going to very high liabilities is the correct way to go, or whether people, as I say, will set up separate cor-

porations for every vessel, and if the vessel is worth \$100 million, well that's it, you can take it. And that's the end of our liability.

Mr. JORLING. Well, Senator, if I could just add on that point.

Senator CHAFEE. Briefly.

Mr. JORLING. High liability limits attached to joint and several liability will induce that high standard of care. The person must not operate under the notion that the cost of paying the fee into the fund is in a sense an insurance against the risks involved. Industry can't make risk the cost of doing business. So you have to penetrate to liability, and joint and several is liability the proper vehicle to do that in addition to high limits of liability.

Senator CHAFEE. This is a fine approach, but both of those major incidents we're discussing, the one in your State and the one in my State resulted I could have been prevented if they'd had pilots aboard, I assume. Certainly it would have in our situation in Rhode Island. I'm thinking more of taking action related to the function of the pilot; where ships have to pick up the pilots, things of that nature.

My time is up, but all this about liability, but my mind is thinking along other systems as well, that's all.

Mr. JORLING. Senator, if I could just impose one more thought.

Senator BAUCUS. Very briefly, Mr. Jorling, 30 seconds, because we've got to move on.

Mr. JORLING. I recently flew on a B-52 and when it landed it was met by a truck on the runway, guiding it to its hangar. I think it's appropriate to consider whether vessels of certain size, certainly supertankers, should be preceded by another vessel whenever approach to the coastline. In other words, they would have to follow that vessel, rather than having pilots or masters on board. I think there should be a double check on the entry of these kinds of vessels into port.

Senator CHAFEE. Thank you.

Senator BAUCUS. We appreciate it.

Senator LAUTENBERG.

Senator LAUTENBERG. Thank you, Mr. Chairman.

We're pleased to have you both here, and I would ask if you had a chance to look at the bill that I've submitted, that was incorrectly referred to the Commerce Committee for review. That was an inappropriate referral and we're putting it back and it's coming to this committee. It deals with contingency plans, and I was interested in your responses to whether or not it ought to be Federal or State, or a combination of industry and so forth.

In your judgment is there any agency in these Governments, your State, this Country, that has the unique capacity to evaluate contingency plans? Is there any one that comes to mind? Is it not the Coast Guard, if it doesn't come to mind?

Mr. KELSO. The Coast Guard at the Federal level, and in our State my agency. We have both expertise and a statutory mandate.

Senator LAUTENBERG. Do you agree, Mr. Jorling, that the Coast Guard has a unique capacity to do these evaluations?

Mr. JORLING. Well, I think it has acquired unique expertise have been the on scene coordinator for some time now.

Senator LAUTENBERG. Do you think we ought to coordinate it as much as possible to a single place?

Mr. JORLING. Yes, and I would add EPA has to be included in that.

Senator LAUTENBERG. There can only be one manager, as you know. And I would ask you both again to look at the bill that I've submitted, because I deal with the problems that Senator Chafee has raised. My bill, at the prevention level, deals with given systems or Protocols that have to be observed including perhaps the identification of a masters', skippers' faults, problems, habits, having to deal with the level of liability. And, Mr. Jorling, I was interested in your comment that you had a problem with the Majority Leader's proposal for fixing liability. He said it ought to be infinite. Do you have a larger view than that?

Mr. JORLING. I think while the Majority Leader has expressed infinite liability limits here, the bill, as I understand it and read it, has a limit of liability which is low.

Senator LAUTENBERG. Yes, he's proposed a change in that.

So you don't want to put a cap on it, do I understand?

Mr. JORLING. The argument about caps always prompts the question of whether the limit of liability is insurable. Industry will make the case that because limits above a billion dollars, or above infinity, are uninsurable it would be impossible to satisfy the financial responsibility requirements as a condition of operating. So, I think as a practical matter there will be some limit.

Senator LAUTENBERG. Mr. Kelso, do you know what Exxon's financial capacity is? Do you have any idea? Do you know how much money they made last year?

Mr. KELSO. I don't know how much they made, but it's substantial.

Senator LAUTENBERG. I think it was about \$5 billion last year. That would indicate pretty good capacity to deal with the problems.

I spent a week in your State just a couple of weeks ago, and I was there in March, and I traveled the State. It's a magnificent place. We ought to do whatever we can to protect it. And that, then, gets to the problems that you have to deal with. You may not be making the policy, but if you had to make a decision now, do you want to keep drilling?

Mr. KELSO. Drilling is a very different situation than tanker traffic, because the risk is different, the amount of oil that can be discharged at a given unit of time is different. With a tanker you can get an instantaneous discharge, essentially. I'm using that somewhat loosely, but you get a lot of oil in the water very fast. With an exploratory well, you have a very different picture. And with a production well, you have still a different picture.

Senator LAUTENBERG. How about offshore drilling?

Mr. KELSO. It depends on the area. In Bristol Bay we think that should be off limits. That has tremendous biological value. It's a world class fishery. It's the largest sockeye salmon fishery in the world. A billion dollar fishery.

Senator LAUTENBERG. Not any more. I caught a lot of fish there.

Mr. KELSO. But, we'll renew it next year.

Senator LAUTENBERG. It's a wonderful, wonderful place. Everybody ought to visit, I must tell you.

If you had to assess the level of completion of the treatment process by the parties concerned with the Prince William Sound spill where would you say you think we're at?

Mr. KELSO. Exxon is substantially behind schedule. They need to stay on the job beyond September 15th, as long as weather and safety considerations allow. They need to be on site over the winter to work with us in the field, and they need to be ready to come back full strength in the Spring as early as possible.

Senator LAUTENBERG. If you had to grade them, now how far along would you say they are?

Mr. KELSO. Well, within Prince William Sound they've treated, not cleaned, but treated about 68.4 miles of shoreline. There's been some additional work done outside of Prince William Sound, but we're looking at hundreds of miles of contaminated shoreline. Our actual documentation is 728 miles. We expect that additional hundreds have been hit since that survey work was done.

Senator BAUCUS. Thank you, Senator. Thank you both very much. We appreciate your time.

Our next panel consists of Mr. Ken Dickerson, who is the Vice President for Atlantic Richfield; Mr. Joseph Farrell, President of the American Waterways Operators, Mr. Thomas James, General Counsel, Louisiana Offshore Oil Port; and Mr. Charles DiBona, President of American Petroleum Institute.

Mr. Dickerson, why don't you begin? Please remember that we're going to hold you to five minutes.

**STATEMENT OF KENNETH R. DICKERSON, VICE PRESIDENT,
ATLANTIC RICHFIELD CO.**

Mr. DICKERSON. Thank you, Mr. Chairman.

ARCO has long supported oil spill legislation that would create a single, comprehensive fund financed by our industry to deal with oil spill cleanup and damages. We believe the key to cleanup success is preparedness and clear lines of oil removal authority and responsibility. We recognize that many States, private corporations, and oil transportation companies are capable, or certainly could be made capable of expeditiously cleaning up oil spills.

However, Government jurisdictional responsibilities overlap and this can and does delay critical decisions and consumes valuable time while the spill continues to spread over a wider and ever less manageable area. More importantly, we estimate that 75 percent of the Nation's crude oil will be imported on foreign-flag tankers by the end of the 1990s, and provision must be made now to create and fund a national oil spill cleanup capability. Multiple levels of spill removal responsibility, each with its own required equipment, staff, maintenance and funding is not the most effective way to clean up a spill. Moreover, as budgetary pressures impinge on each of several different response organizations, each could believe and assume that other organizations would handle a portion of the problem. Reliance upon others without direct involvement and full knowledge of their capabilities could present the classic fools paradise. It could even lead a spiller or cleanup group to reduce or minimize its own commitment. And that, as you well realize, would create the worst possible situation.

These considerations have led ARCO to strongly believe that the Federal Government, acting through the Secretary of Transportation, must be given the sole and exclusive authority and responsibility for cleaning up all oil spills into or upon the waters of the United States. This approach is similar to current law, except that current cleanup authority is permissive rather than mandatory, and funding does not now exist for adequate Department of Transportation cleanup preparation and response.

While ARCO's proposal would provide a single point of responsibility for oil spill removal, this would not preclude utilization of State, local or private equipment, supplies and manpower by the Secretary. And other inventories of these items could and should be considered by the Secretary in developing a comprehensive, integrated spill removal action plan. However, the Secretary should be authorized to fully equip his department from a new Federal fund to respond to and clean up any foreseeable oil spill in the United States.

We believe that this objective could be easily accomplished by amending Section 311 of the Federal Water Pollution Control Act.

Our greatest concern is that oil spills be cost effectively cleaned up as quickly as possible, before environmental harm of any consequence can occur. And while we believe that the U.S. Government should be responsible for the actual spill removal, the cost of that removal should be paid for by the spiller. That is, the spiller should be required to reimburse the Federal Government for all spill removal costs and the spiller should be involved in cleanup as directed by the Secretary. For pre-spill preparation costs, such as planning, purchase of equipment, training and oil removal costs which cannot be collected from an insolvent spiller, we believe that an oil-industry financed Federal fund should be utilized to pay these costs.

In addition to supporting the creation of a new single, Federal oil spill fund, we also support merging the Federal funds created by the TAPS Act, the OCS Act, and the Deep Water Ports Act, into a single Federal fund which would immediately exceed \$400 million. The fees currently or previously collected by these funds would be replaced by the new Department of Transportation fees. In addition, because the three existing funds were created by per barrel assessments, rather than general appropriations, we would support past payers of these monies receiving a credit against the tax or fee obligations of the new fund, after the liabilities of existing funds, including the Valdez spill have been paid.

To summarize, we support a national oil spill cleanup capability, paid for by the industry by a fee assessment on a per barrel basis on all crude oil refined in the United States, and on all barrels of imported product. We support the industry being involved to the extent that a spiller, if there is a spill, the spiller would be directed by the Coast Guard to provide whatever assistance was required, but that the Coast Guard be armed, be equipped, and be funded to pay for all oil spill cleanups.

Thank you.

Senator BAUCUS. Thank you, Mr. Dickerson.

Mr. Farrell.

STATEMENT OF JOSEPH FARRELL, PRESIDENT AMERICAN WATERWAYS OPERATORS, ACCOMPANIED BY DENA L. WILSON, VICE PRESIDENT OF LEGISLATIVE AFFAIRS

Mr. FARRELL. Good afternoon, Mr. Chairman, Senator Chafee. I'm Joe Farrell, president of the American Waterways Operators. We represent the domestic tug and barge industry. I have with me Ms. Dena Wilson, vice president of legislative affairs.

Senator BAUCUS. I heard you say domestic there.

Mr. FARRELL. I'm glad you caught that, Mr. Chairman.

In the last four months this Nation has witnessed a torrent of commentary with respect to the tragic accident at Valdez. And I think much of that has been helpful.

I would like to begin by reminding all of us of the things that we agree on. There's been so much back and forth with respect to disagreement and dispute, that we need to remind ourselves that we're all seeking the same basic goal. And that is, as Senator Chafee pointed out a short while ago, the maximum attention possible focused on developing reasonable, effective ways to avoid these catastrophes in the future, at least take them down to the lowest possible level of happening again.

And if they do happen, God forbid, that we are poised for quick containment and cleanup and that we are ready to compensate those that have been injured, and that we are prepared and able to restore any damages to natural resources. Those are the things I think everybody agrees on. The disagreements surround how you get there best. And I think rather than wringing our hands about the disagreements, we should celebrate those disagreements. It's after all the clash of ideas that most often produces the best solutions.

I would like to focus for a moment on an area where there is at least confusion and perhaps some disagreement as well. And that is the question of limiting liability, or unlimited liability. First of all, when one talks about limiting liability, you're not talking about limiting access to claims. You're talking about that threshold point where the exposure shifts from the shipowner to the cargo owner. The legislation being contemplated now with respect to a Federal fund looks at a half a billion dollars with an additional, in one case at least, additional authority to borrow another half billion dollars. So we're not talking about inconsequential sums above and beyond the threshold.

We think that unlimited liability is a way to chase out of the American industrial economy water transport of oil. Before anybody would adopt that kind of immature, in my judgment, position, hopefully some serious thought will be given to it. Our industry, is a vital part of this Nation's industrial economy, with a very proud safety record, incidentally.

Also, to be borne in mind in this regard, I believe, is the concept of shared liability. It is my profound experience that shippers are very careful about who they select to carry their cargoes. Shared liability only enhances that when you stop to think about it. It is all the more important to the shipper, to the owner of the cargo that he pick somebody with a good record. That happens day in and day out in this country. We need to remember that. An histor-

ic difference our industry has had with this committee, of course, of Federal preemption. What I have just said is linked to that.

In closing, I would like to comment based on what I heard earlier, and what I've read over the weeks and months. There seems to be a small body of opinion that suggests that our industry are greedy, wanton spillers. That, any thinking person knows, is absolutely false. We're in business. We seek to make a profit. I assume you applaud that. That's the American economy. But we're first Americans, and we're parents. And we don't care any less about this Nation's environment than you do, or the so-called environmental community does.

Thank you.

Senator BAUCUS. Thank you, Mr. Farrell.

Mr. James.

STATEMENT OF THOMAS JAMES, GENERAL COUNSEL, LOUISIANA OFFSHORE OIL PORT

Mr. JAMES. Mr. Chairman, LOOP owns and operates the Louisiana Offshore Oil Port. We're the only deepwater port licensed under the Deepwater Port Act that was established in 1974. In looking back over our eight years of operation, we have been very successful in minimizing the number of spills and the quantity of oil that's been released into the environment.

To date, of the 1.5 billion barrels of crude oil that we've transported, only 800 barrels have been released into the environment. We are confident that, from an environmental perspective, Deepwater ports, in general, and LOOP in particular, is a significant superior means of bringing imported crude oil into this Country.

Over 15 years ago, this committee recognized that oil imports into the United States would increase, that the foreign oil would be carried by super tankers too large to enter into U.S. ports, and that to protect the environment the tankers should be offloaded at deepwater ports located offshore in the open ocean and in deep water, rather than offloaded or lightered by multiple small tankers that would in turn enter and offload at increasingly congested inland ports.

This committee originally drafted and reported out the Deepwater Port Act. It authorized the construction of such ports with environmental safeguards assured. But today, 15 years later, only one deepwater port has been built, and that's LOOP. LOOP has no immediate plans for expansion, and to our knowledge, there are no other deepwater ports planned. The reason for that is simple, it's economics.

Deepwater ports and LOOP may be an environmentally preferable way, as this committee determined in 1974, to offload crude oil, but it is more expensive. Costs of deepwater port operation are driven up by regulatory disincentives, there being no economic edge given to this environmentally preferable method of offloading oil. This legislation, 686, with amendments that we will suggest, can reverse this situation. We feel that tanker traffic can be attracted to offload at the environmentally preferable oil ports located in deepwater.

The points that we want to make today are the disincentives in the legislation that discourage the use of deepwater ports; and concern over the legislation's failure to exercise jurisdiction to enforce liability and financial responsibility requirements against lightering operations occurring within the exclusive economic zone but outside U.S. territorial waters.

LOOP has spent \$750 million building the facility and a significant amount of money complying with the Congressional mandate to make LOOP an environmentally preferable transportation method. We feel there is minimal risk that a claim will be made because of a spill at LOOP, or any future deepwater port. We suggest that recognition of deepwater ports, as a preferred way to transport crude oil should be given by eliminating the assessment that is proposed on oil that comes through LOOP. This would place LOOP on a level playing field with the alternate modes of transporting crude oil and it would be most significant way the committee could recognize the relative risks involved in bringing oil in through the different modes of oil transportation. Imposing the same fee on oil moving through LOOP, a safer method, as this committee previously stated, of transporting crude oil, as is imposed on conventional methods of offloading and transporting crude oil is unfair as the risk at LOOP is significantly lower. The risk at LOOP is significantly lower as a result of the environmental safeguards that were imposed on LOOP by this committee.

In addition, S. 686 provides a way of lowering the liability limits for deepwater ports by permitting the President to reduce them. We think that authority should also be given to lower the liability limits on tankers that call at LOOP.

The last area we want to address is the failure of the legislation to enforce financial responsibility and liability requirements against vessels operating in the EEZ. The bill's liability and financial responsibility should be amended to ensure their enforceability against tankers which lighter or offload their cargo without entering U.S. waters. Those vessels are within the EEZ and are clearly subject to U.S. jurisdiction.

Our closing thought is that the committee should look at whether or not there are disincentives to using deepwater ports, which the committee feels, or felt in the past, was a preferable way to bring crude oil into the Country. We feel that the committee should remove those disincentives by not imposing the fee on the oil that is shipped through LOOP and also eliminate the disincentives by broadening the liability enforcement.

Thank you, Mr. Chairman.

Senator BAUCUS. Thank you, Mr. James.

Mr. DiBona.

STATEMENT OF CHARLES J. DiBONA, PRESIDENT, AMERICAN PETROLEUM INSTITUTE

Mr. DiBONA. Thank you, Mr. Chairman, and Senator Chafee. My name is Charles DiBona. I'm President of the American Petroleum Institute.

Our industry strongly supports legislation to reduce the economic impact of oil spills. This position is not new. For 15 years API

has vigorously and repeatedly advocated comprehensive Federal legislation covering oil spill liability and compensation. The tragic spill in Alaska's Prince William Sound and the spills in late June underscore the need for such legislation.

Today I want to assure you that API and its members are ready to assist your subcommittee and Congress in its work to establish a single Federal regime that eliminates the overlaps, conflicts and deficiencies of existing oil spill compensation and liability arrangements. Sound legislation can and should be enacted this year.

API believes comprehensive oil spill liability legislation should incorporate four fundamental principles. First, the spiller should be on the front line, responsible for removal costs and damages directly resulting from the spill up to the applicable liability limit. Second, all oil spill removal costs, economic losses directly resulting from the discharge and actual costs incurred to restore and replace environmental losses should be compensated. Third, to supplement liability of the spill, the companies that handle oil should contribute to a reasonably sized fund to help meet the costs of removal and compensation for direct damages. Fourth, a comprehensive Federal regime should be the only liability system should oil be discharged into the marine environment.

This last point is especially important, both to the claimant and the industry. Few States currently provide funds for third party damages. Those with funds could not meet damages arising from catastrophic spills. If some of your constituents should lose their means of income due to a spill, API does not believe that they should have to hire lawyers, file briefs, and wait years to receive compensation. And neither should ship owners or facility owners spend years in court when a single uniform comprehensive standard can be set that applies to all jurisdictions. That is why API is troubled by some of the provisions of S. 1066, and S. 686, the oil spill liability bills before this committee.

S. 1066 does not effectively reflect the four principles I've outlined, especially the one calling for a single liability system for all oil spills. And as it is now written, S. 1066 requires that Congress ratify the International Civil Liability Convention and Fund Convention, and their respective Protocols. API recommends consideration of ratification to the Conventions and Protocols be delayed until the United States has passed its own comprehensive oil spill and liability legislation. It is unclear to us how the complex provisions of the Conventions and Protocols would interact with the legislation now being considered.

S. 686 seeks to be a comprehensive piece of Federal legislation, yet section 106 permits claimants to invoke the existing patchwork of oil spill liability and compensation laws. S. 686 needs to be revised so that no action can be brought in a court of the United States, or any State or political subdivision thereof, for any removal costs damage or other relief resulting from discharge of oil from a facility or a vessel, except as provided by Federal legislation. API also opposes the double taxation that would occur if S. 686 were passed. This bill currently sanctions State funds to pay for oil spill costs and damages. API believes this would duplicate a Federal cleanup fund and cause undue taxation. However, API supports those provisions in S. 686 that would maintain State funds for

training, research and equipment purchases, and for cleanup and removal of land spills.

API will continue to work with the Congress toward a constructive solution on the serious issue of oil spill liability compensation.

I might just add, that as I've sat here and listened to what has transpired, I am somewhat struck by a lack of balance in what has been said so far. On one hand, it is clear that we ought to have enough clear liability directly applied to potential spillers so they will act promptly, and take due care. On the other hand, you can lay on provisions which do a number of negative things. One of them will be to create the kinds of situations that Senator Chafee mentioned. This does not apply to members of the API, who have a longstanding relationship in facilities in the U.S., but there are a lot of foreign shippers who bring cargo into the United States but are not operating in the U.S. and are sometimes owned by foreign countries. The oil is not necessarily owned by any U.S. entity until after it is delivered. So you can have situations where real liability is very limited. Those people can be forced to demonstrate fiscal responsibility, or purchase insurance. But then it will be limited to whatever amount is specified. In other words, you are going to encourage that kind of operation and discourage the kind of responsible performance that you've seen up in Alaska. There's a lot of complaint about Exxon, but it has spent \$600 million. And it acted very quickly. And it brought a lot of resources to bear. So you should be very careful in how you proceed here, because you can discourage responsible action in trying to ensure that people will behave responsibly. You can go too far, and unlimited liability carries that connotation.

Senator BAUCUS. Thank you, Mr. DiBona.

Mr. DiBona, Mr. Farrell, Mr. James, I'd like you to think about these next points I'm going to mention. They're the points that Mr. Dickerson gave in his testimony, and I'd like your response to them. He said, on behalf of ARCO—correct me if I'm wrong, Mr. Dickerson—that the Secretary of Transportation should be given sole and exclusive responsibility for cleaning up spills. That's point number one. Number two, that the Secretary should be authorized to fully equip the Coast Guard to respond to cleaning up spills. Third, the cost of the cleanup should be borne by the spiller. And fourth, pre-spill preparation costs as in planning, purchase of equipment, et cetera, and cleanup costs that cannot be collected from the spiller should come out of a Federal fund, say similar to that provided for in S. 686.

I'd like to ask each of the three of you the degree to which you agree with each of those points. Mr. DiBona?

Mr. DiBONA. Well, the API has put together a rather comprehensive study and initiated a program to carry out cleanups in instances where spills occur. Incidentally, that program also has a number of other objectives. The first is—

Senator BAUCUS. Which of these four points do you agree with or disagree with?

Mr. DiBONA. Well, I'm going to touch on all four of them.

Senator BAUCUS. OK.

We haven't a lot of time, so that's why I'm pressing you.

Mr. DiBONA. All right.

Then, I will quickly go down the list. The first, we recommend in that program that although the industry would be providing the wherewithal to proceed with the cleanup through this organization called PIRO, where we would have five organizations around the Country, that the Secretary of Transportation, acting through the Coast Guard, take responsibility for initiating and directing action, because of the problems associated with moving quickly that have been mentioned here. So we would agree with that.

Senator BAUCUS. OK, you have to go quickly.

Mr. DiBONA. OK.

With regard to a fund cleanup, we would be providing capability in five regions in the United States to do that, with a fund that over 5 years would be \$250 million.

Senator BAUCUS. But first, do you believe the cost of the cleanup should be borne by the spiller?

Mr. DiBONA. Yes. There's no question that we believe the cost of the cleanup should be borne by the spiller up to the limits of liability. And there should be a fund that would provide for amounts above that.

Senator BAUCUS. OK.

Mr. Farrell?

Mr. FARRELL. I essentially agree with the points that you've put out. I'd like to comment on a couple of specifics.

It would be nice if these things lent themselves to brevity and simplicity, but they don't. We have asserted in our formal testimony in the strongest language I could come up with, that the Coast Guard, the Federal Government, the instrument being the Coast Guard, should be absolutely responsible to take charge of the clean-up operation. Having said that, we need to recognize that two-thirds to 85 percent of the spills in the period of 1984, 1985, and 1986, the latest date I can find, were 100 gallons or less. So that begins to suggest that certain reflections should be undertaken with respect to how the Coast Guard would get into a one gallon spill, just for one example.

But the fundamental point is the Federal Government, through the Coast Guard, we believe should be responsible for the spills.

Mr. DiBONA. I was referring, by the way to very large spills.

Senator BAUCUS. Right.

Mr. James.

Mr. JAMES. Mr. Chairman, you'll have to help me with all four points. But on the first one, whether or not the Government would take the initiative or we would. Under the Deepwater Port Act, deepwater ports are required to take the initiative with the approval of the Coast Guard and they can either approve of what we're doing, or disapprove it. The few spills that we have had, we have taken the initiative, moved out with the Coast Guard's approval. Whether the legislation provided that the Government or the Coast Guard would take the initiative would not affect LOOP's effort at maintaining spill response equipment, and its desire to move forward and respond to the spill.

Senator BAUCUS. Let me ask another question very briefly. You heard the three Attorneys General very strongly, unequivocally state that there should not be Federal preemption. The Federal

preemption under the Protocols, for example, would very dramatically limit their States' residents from proper recovery. Response.

Mr. FARRELL. I believe that our association agrees with them, but for different reasons.

Senator BAUCUS. Mr. James.

Mr. JAMES. We don't have a position, Mr. Chairman, on this.

Senator BAUCUS. Mr. Dickerson.

Mr. DICKERSON. Focusing just on the oil spill cleanup, we feel that if there's a multiplicity of cleanup capability throughout the United States, confusion could result and delay the actual cleanup of the spill. That's why we advocate the sole, exclusive authority in the Federal Government. This would relieve the States of the obligation, for example, to have funding, and many of them are adopting \$50 million funds. So preemption to the extent that the Federal Government—

Senator BAUCUS. On liability, though.

Mr. DICKERSON. Liability, no.

Senator BAUCUS. No, what?

Mr. DICKERSON. No preemption.

Senator BAUCUS. But why?

Mr. DICKERSON. Because, well, there shouldn't be double collection. But in some instances it might be better to proceed through the State courts than the Federal courts.

Senator BAUCUS. OK.

Mr. FARRELL. I want to clarify. My answer was aimed at the Protocols, not domestic legislation.

Senator BAUCUS. OK.

My question goes to the Protocols, because they were all opposed to the Protocols.

Mr. DiBONA. We're in favor of preempting—

Senator BAUCUS. Why?

Mr. DiBONA. The reason is that we believe that a Federal fund can be made large enough to cover any spill. It is more efficient to do that at the Federal level and there ought to be a direct way to compensate all of those people that is simple and straightforward in one jurisdiction.

Senator BAUCUS. That's compensation. That doesn't get to the question of liability and prevention.

Mr. DiBONA. Well, they're principle—

Senator BAUCUS. One of the rationales, there's several, but one of the rationales of the States' Attorney General is prevention.

Mr. DiBONA. OK.

Well, I was responding—the way you phrased the question was to raise the question of compensation, that some damages would not be compensated, and I was trying to put that aside.

Senator BAUCUS. I see.

Mr. DiBONA. So it is perfectly possible to provide enough funding to ensure that all valid claims are compensated, so that the notion that you have to have a State fund is simply not true.

The second question, with regard to prevention, I think I've answered before, but let me try it again. A liability level of \$100 million is certainly going to cause people to take great care. When you go above that then you introduce certain other things. One of them is, the kind of thing that Senator Chafee mentioned, that is a tend-

ency to, among some people, some importers, to look for corporate veils that would escape the affect of the liability.

Senator BAUCUS. Thank you.

Mr. DiBONA. The other possibility is that you will try and insure for this. You may not succeed in getting insurance for that level of liability, you cannot get unlimited liability insurance. The cost will be very high.

Senator BAUCUS. My time has expired. Thank you very much.

Senator Chafee.

Senator CHAFEE. Thank you, Mr. Chairman. Quick answers, gentlemen.

Mr. James, you pointed out that LOOP was losing money. You also talked about the liability charges you were having, the costs of your liability insurance, I presume, and if there was unloading to lighters or smaller tankers further out they wouldn't be subject to that. Are you suggesting that the fact that LOOP is losing money is due to this insurance, or is due to other problems?

Mr. JAMES. The principal reason is the cost of the facility.

Senator CHAFEE. The cost of the facility?

Mr. JAMES. Yes, sir.

Senator CHAFEE. So this—I'm not brushing off this problem, but the point you made was not a significant factor in causing LOOP to lose money?

Mr. JAMES. Are you talking about the—

Senator CHAFEE. The insurance and the liability?

Mr. JAMES. No, sir. It is important to us, but it is not the principle reason we are losing money.

Senator CHAFEE. OK.

Now, of all the discussion we've had here before, I don't think there's a competitive problem raised with any rules that we apply would apply to incoming tankers. They'd be subject to the liability, except for those served by Mr. Farrell, the American Waterway Operators, who by imposing unlimited liability, joint and several liability, whatever we do here, it puts you, Mr. Farrell, your appliance, members, in a very difficult competitive position because you've got the railroads and so forth to deal with. That's correct, I assume.

Mr. FARRELL. That's right.

Senator CHAFEE. The State of Maine, I believe, has unlimited liability, if I understood correctly. What happens with your operators up there. Your members must operate up in Maine, what do they do when there's unlimited liability?

Mr. FARRELL. Well, that's the point that I was trying to address, Senator. You're kind of caught in the switches, in the sense that a businessman, any prudent businessman is not going to stay in business facing unlimited liability. You decrease the service to the State involved. We do—our members do call in Maine, but to a very limited extent. I am, frankly, not familiar with whether that's due to economic reasons, or it's due simply to the unlimited liability. I don't know the answer to that.

But the point, I think, is not only the competition with the railroads, but also that you can reach the point where you will drive our industry out of business.

Senator CHAFEE. What do your operators do when you're dealing with a whole series of States, each of which has its fund, each of which is putting a penny a barrel, or whatever it might be, tax on to support both their fund and, as I understood in Maine, they've got equipment scattered all over the place to respond to spills. What happens, do you pay into all of these—which ones do you pay into and which don't you?

Mr. FARRELL. To the extent that the State laws require our industry to pay in, obviously we pay in. That's one of the reasons—not the only one—that we are in favor of Federal preemption. We think, and have made strong arguments, that that's also beneficial to the States and to the claimants as well.

Senator CHAFEE. I wasn't quite clear in the discussion between the Chairman and Mr. DiBona, where you were talking about liability as opposed to compensation. You're for preemption, Mr. DiBona, right? In other words, you don't want each of these States to have their separate funds?

Mr. DiBONA. We don't care—well, we do not object to a fund where the State sets up capability for the initial stages of cleanup and some other activity.

Senator CHAFEE. In other words, if money is going into some sort of response, booms for example.

Mr. DiBONA. Yes.

Senator CHAFEE. Whatever it is.

Mr. DiBONA. Where the State needs to move very quickly, and wants to have a fund for that, and for training and for research, all of that kind of thing that it makes sense at a lower level, that would be a reasonable thing to do. What we are concerned about is to have funds that attempt to cover all of the liability costs at each State when you could have one very large one that covers them all, covers each State and is adequate to cover any contingency. That seems to us to be a more economic and reasonable and sensible way to go, and that preempts the States from enacting laws which have unlimited liability.

Senator CHAFEE. Well, that's got to be the answer. My time is up. But Maine has unlimited liability. They don't want to go into any system where there's limited liability. And you can understand their point of view.

OK. My time is up. Thank you, Mr. Chairman.

Mr. FARRELL. May I just add one thing, Mr. Chairman, very quickly. We analyzed the spills that took place in late June with respect to the State laws involved, Rhode Island, Delaware, Pennsylvania, Texas, and if you like, we can submit that analysis for the record. It is very clear that each of those State's laws do not even begin to approach taking care of the problems associated with those spills.

Senator CHAFEE. OK. Now, that's it, thank you.

Senator BAUCUS. Thank you very much.

Senator CHAFEE. The Chairman just asked me if I'd take over so I'm rushing into the bridge here. We both have an appointment at the White House at quarter of two, so thank you all very much, and the next panel if they'd come right forward, we'd appreciate it.

All right, Ms. Sheldon.

Ms. SHELDON. Yes, sir.

Senator CHAFEE. All right, Ms. Sheldon, go right to it.

**STATEMENT OF KARIN SHELDON, SENIOR COUNSEL, THE
WILDERNESS SOCIETY**

Ms. SHELDON. Thank you, sir.

Thank you, Senator Chafee. I'm speaking today on behalf of the Wilderness Society and the Defenders of Wildlife, which are national environmental organizations with more than 400,000 members nationwide. We are relative newcomers to—

Senator CHAFEE. Get right to your point, Ms. Sheldon. I know about the Wilderness Society. I'm a fan of it, so get right into your points.

Ms. SHELDON. Our major point, Senator Chafee, is that we have learned from the recent spate of oil spills that current oil spill liability and compensation arrangements have missed one of the goals of such arrangements, and that is, the prevention of spills in the first place. We recognize, of course, that when you are dealing with human beings, you cannot eliminate accidents altogether. However, by designing oil spill compensation and liability arrangements with a goal of preventing oil spills from happening, we can eliminate the majority of oil spills that occur because of reckless disregard for the safety of other human beings and the environment.

It seems to us that there are three factors that are critical to the prevention of oil spills. The first is no preemption of State law. The second is strict and unlimited liability, and the third is full restoration of damaged natural resources. With respect to preemption, any legislation which is enacted by Congress must include provisions which specifically preserve the rights of States to enact and enforce their own oil spill liability and compensation laws, including the right to impose more stringent requirements on activities which go on within their boundaries than does the Federal Government.

In the absence of such specific provisions, under the weight of court decisions in this country, including the Supreme Court's decision in *Illinois v. City of Milwaukee*, State law is likely to be preempted. So we would urge that legislation which is passed by the Congress have specific provisions concerning preemption.

The second critical factor is liability. It is the most significant factor in corporate decision making because it affects a company's bottom line. The liability limits in the Protocols and in all Federal legislation that we've seen so far are too low. We would urge the Congress to uncap liability and impose strict and unlimited liability on corporations which traffic in oil. If the Congress prefers to set liability limits, these limits should be limited to the financial responsibility of the company and to its commitment to state-of-the-art technology. In other words, if the Congress chooses to impose liability limits on the transportation of oil, it must make the availability of the limits contingent on a showing of financial responsibility by the corporation and use of state-of-the-art safety technology double hulls, double bottoms compartmentalization, whatever it takes to prevent oil spills from occurring and to reduce the impact of those spills when they do occur.

Our third point relates to natural resource damage assessment. We urge the Congress to include replacement cost as the appropriate standard for measuring oil spill damage and cleanup and restoration costs. To rely on lost use value, or a number of the other factors which are presently included in Senate Bill 686, would invite the agencies which are responsible for natural resource damage assessment to choose a measure of costs which will not restore the environment to pre-spill conditions. Congress should impose as the measure of damages what it will cost to replace the ecosystem to its pre-spill condition.

Thank you.

Senator CHAFEE. Well done. Very well done.

Mr. Catena.

STATEMENT OF JOHN CATENA, SCIENCE POLICY ANALYST, THE OCEANIC SOCIETY

Mr. CATENA. Thank you, Senator Chafee. I am John Catena, Science Policy Analyst for the Oceanic Society. I appreciate the opportunity to share our views today on legislative proposals for oil pollution liability and compensation.

Regrettably, as long as we continue to transport oil over the ocean, spills will continue to occur regardless of any new law or regulation. It is for this reason that the enactment of a comprehensive oil spill liability and compensation regime is absolutely essential. What we need is a system with complementary State, national and international components. And those are a comprehensive Federal law, retention of State liability laws, and if possible, U.S. ratification of the 1984 CLC and Fund Protocols. Each can and should complement the other.

S. 686, in most respects represents the kind of comprehensive Federal law that is needed. This bill is far superior to H.R. 1465, it's counterpart in the House. Several provisions, however, need to be strengthened or added. We have detailed our recommended changes to S. 686 in Appendices A and B to my prepared statement.

In the time remaining, however, I would just like to focus on a couple of those recommendations. As I've already mentioned, the retention of State liability laws should be a key component of a new comprehensive regime. It is also our view, however, that a complementary international regime would help to protect ocean and coastal resources around the world. While the 1984 Civil Liability and Fund Convention Protocols are far from perfect, we believe that on balance they do warrant U.S. ratification.

In an effort to achieve both preservation of coastal State liability laws, and if possible, ratification of the international Protocols, we have developed in consultation with others, two possible approaches that we believe deserve the committee's consideration. The concepts, which are detailed in Appendix B would, first of all, require the President to waive the per incident cap under our domestic trust fund to cover awards in the event that the amount of the awards exceeds money available under the treaties and the new domestic law. And secondly, to provide for either an ordering of remedies, or a joinder of the fund provision that are designed to ensure

an alternative source of full compensation in those situations where liability claims might otherwise be brought against the shipowner in violation of the Protocols. The joinder of the fund concept would allow for State law and State court jurisdiction, but would require a plaintiff to join the domestic trust fund in a lawsuit. Under this scenario the trust fund would step in the shoes of the responsible party, once the spiller's liability limits are reached. And thus, the trust fund would be liable for any judgment beyond the spiller's liability limits called for under the Protocols.

We realize that this approach still allows liability limits for ship owners letting them off the hook, if you will, for the cleanup costs and damages beyond those limits. The ratification of the Protocols strongly increases the likelihood that those treaties will come into effect providing protection for coastal waters around the globe and an additional jurisdictional hook and an international source of funds for tanker spills in U.S. waters.

At the same time, with the U.S. party to the Convention, we believe that we can, and must, work for significant changes.

One other point I want to add with respect to deterrents, is that significantly stiffer penalties must be enacted to achieve this. I would also like to add here, that penalties are not preempted if the Protocols were in effect.

Thank you.

Senator CHAFEE. Well, Mr. Catena, I don't understand how you can give us your proposed solution on how we might ratify the Protocols and still not have preemption?

Mr. CATENA. Well, under the scenario that we are proposing is—and this is just one proposal I may add, and this may not be effective. But what we are saying is that the trust fund would step in the shoes of the shipowner once the shipowner's liability limits are reached. So, in the State of Maine, for instance, where it has unlimited liability limits a plaintiff could bring a lawsuit under State law against the shipowner. And once his liability limits are reached, if the judgment were rendered, say above the \$78 million liability limit of the protocol, then the trust fund would step in the shoes of that shipowner and thus, the fund would then assume responsibility of the shipowner's liability up to whatever the limit of the judgment happened to be.

Then the fund then has recourse.

Senator CHAFEE. You lost me at one of those corners there. He grounds in Maine, gets in trouble in Maine, is found liable in excess of the limitations. Then the international trust fund would step in and cover the balance in excess of that?

Mr. CATENA. Well, it would be both the international and the domestic trust fund.

Senator CHAFEE. But I thought the whole point of the Protocol is that it would have an international trust fund, right?

Mr. CATENA. That's one of the components, yes.

Senator CHAFEE. And so whatever damages were assessed would be paid first out of that international trust fund, wouldn't they?

Mr. CATENA. No, they'd first be paid for by the spiller, up to his \$78 million liability limit. Whatever is beyond that would then be paid for by the fund. This scenario just allows for the State law to

be used. In effect, it has the same effect of limiting liability, but it allows the State law to come into effect.

Ms. SHELDON. Senator Chafee, if I may comment on that. The oil spill Protocols are very clear that they will apply exclusively. Preemption is the inevitable result of both applicable Federal provisions as they now exist, and State law. So I don't see how we can attach a State or even a Federal trust fund onto the system. The Protocols call for the Protocols to place in effect a single international system. And to replace existing arrangements. So this is a sort of Rube Goldberg connection, which I think represents a wonderful idea, but in fact, under the weight of court decisions in this Country, will not be viewed as acceptable. The Supreme Court has made very clear in *Illinois versus City of Milwaukee*, that when you have a comprehensive scheme, even one that is inadequate, that has obvious loopholes, it preempts other regulatory schemes.

Senator CHAFEE. Well, that's what I thought too. Well, you've given us plenty of material to digest here.

Mr. CATENA. Mr. Chafee, could I just add one more thing?

Senator CHAFEE. Yes.

Mr. CATENA. We have had some informal discussions with some Government officials, and it is their opinion that this approach may be possible without attaching a reservation to the Protocols.

Senator CHAFEE. OK.

Well, thank you both for coming. Mr. Catena, are you at the University of Rhode Island Graduate School? Where are you?

Mr. CATENA. Yes, Marine Affairs. Well, that's where I graduated from, yes, sir.

Senator CHAFEE. And now you're with Rhode Island Marine Affairs?

Mr. CATENA. No, I'm down here now. I've been working with—

Senator CHAFEE. Oh, you're here. You're full time with the Oceanic Society?

Mr. CATENA. Right.

Senator CHAFEE. Good. Well, we're proud of you.

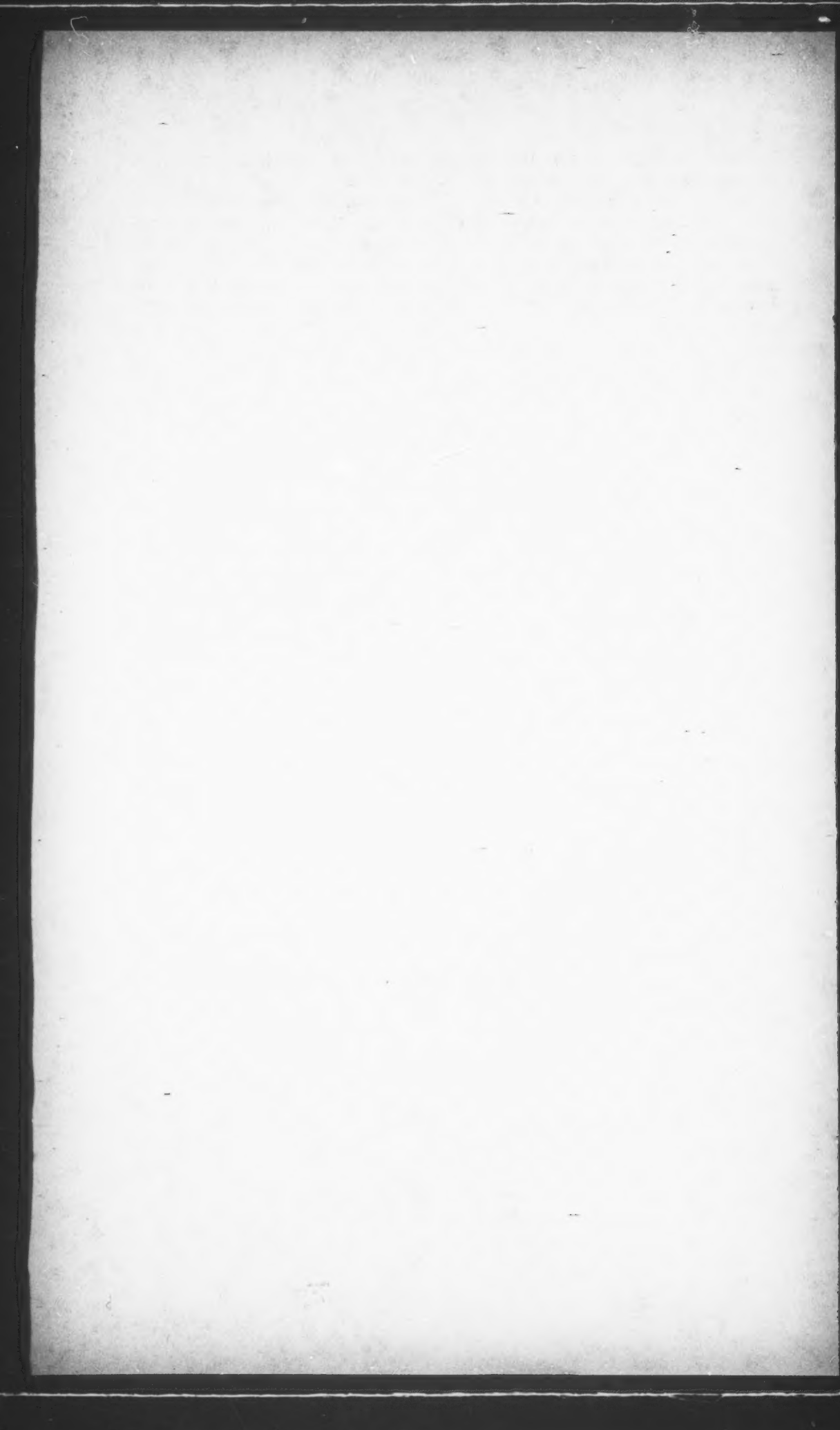
Mr. CATENA. Thanks.

Senator CHAFEE. Thank you. Thank you both, Ms. Sheldon.

The committee is adjourned.

[Whereupon, at 1 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and the bills being considered follow:]



APPENDIX

FINAL

STATEMENT OF THE SECRETARY OF TRANSPORTATION

SAMUEL K. SKINNER

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION

UNITED STATES SENATE

FRIDAY, JULY 21, 1989

9:30 A.M., 406 DIRKSEN SENATE OFFICE BUILDING

OIL POLLUTION LIABILITY AND COMPENSATION LEGISLATION

GOOD MORNING, MR. CHAIRMAN,

IT IS A PLEASURE TO APPEAR AGAIN BEFORE THIS COMMITTEE TO REAFFIRM THE ADMINISTRATION'S STRONG COMMITMENT TO COMPREHENSIVE OIL POLLUTION LIABILITY AND COMPENSATION LEGISLATION THAT IMPLEMENTS THE 1984 PROTOCOLS TO THE TWO OIL SPILL TREATIES, THE 1969 CIVIL LIABILITY CONVENTION AND THE 1971 FUND CONVENTION.

AS YOU KNOW MR. CHAIRMAN, THERE IS WIDE AGREEMENT AMONG THE STATES, THE CONGRESS, THE ADMINISTRATION, THE ENVIRONMENTAL COMMUNITY AND THE OIL AND SHIPPING INTERESTS THAT IN ADDITION TO A FIRST CLASS OIL SPILL RESPONSE CAPABILITY, THIS COUNTRY NEEDS AN EQUITABLE, ADEQUATE AND COMPREHENSIVE SYSTEM TO COMPENSATE THOSE DAMAGED BY SPILLS. THERE IS ALSO WIDE AGREEMENT ON THE NEED FOR A TWO-TIER LIABILITY SYSTEM BASED ON HIGH BUT FAIR LIMITS OF LIABILITY FOR TANKERS, OTHER VESSELS AND FACILITIES BACKED UP BY

AN OIL-INDUSTRY FINANCED FUND TO COVER CATASTROPHIC COSTS IN EXCESS OF THE RESPONSIBLE PARTY'S LIMIT OF LIABILITY. WE ARE UNITED IN OUR GOAL TO PROTECT OUR ENVIRONMENT AND TO COMPENSATE OUR CITIZENS. THE TIME IS NOW TO SETTLE THE FEW DIFFERENCES THAT REMAIN ON THIS MATTER.

MY TESTIMONY THIS MORNING WILL FOCUS ON THREE AREAS WHERE THERE IS DISAGREEMENT BETWEEN S. 1066, THE ADMINISTRATION'S LEGISLATION AND S. 686, SENATOR MITCHELL'S BILL: THE INTERNATIONAL OIL SPILL PROTOCOLS; THE PAYMENT OF THIRD PARTY DAMAGES FROM THE OIL SPILL LIABILITY TRUST FUND; AND THE AUTOMATIC FEDERALIZATION OF OIL SPILL CLEANUP OPERATIONS. I WILL ALSO DISCUSS CIVIL PENALTIES.

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, WE ARE A LARGE NATION OF CLOSE NEIGHBORS. ALL AMERICANS SHARE AND CHERISH OUR NATURAL RESOURCES AND ARE COMMITTED TO PRESERVE AND PROTECT THEM. THE OIL SPILL IN PRINCE WILLIAM SOUND POLLUTED THE BACK YARD OF THE CITIZENS OF RHODE ISLAND AS SURELY AS THE SPILL IN NARRAGANSETT BAY.

UNDER THE CLEAN WATER ACT, THE COAST GUARD IS RESPONSIBLE FOR SEEING THAT SPILLERS QUICKLY AND PROPERLY CLEAN UP THE POLLUTION THEY CAUSE AND PAY FOR THAT CLEANUP. AND, I MIGHT ADD HERE, THAT THE COAST GUARD DOES AN OUTSTANDING JOB, AS OUR RECENT EXPERIENCES IN ALASKA, RHODE ISLAND, TEXAS AND DELAWARE BAY DEMONSTRATES. IF

THE RESPONSIBLE PARTY IS UNWILLING OR UNABLE TO CONDUCT THE CLEANUP, THE COAST GUARD FEDERALIZES THE OPERATION, PAYS FOR THE CLEANUP OUT OF THE 311(K) FUND, AND SEEKS REIMBURSEMENT FROM THE SPILLER. YET, OUR FEDERAL FINANCIAL RESPONSIBILITY LAWS ARE INADEQUATE. THE COAST GUARD OFTEN IS ABLE TO COLLECT ONLY A FRACTION OF THE AMOUNT IT EXPENDS FOR CLEANUP AND THE 311(K) FUND WHICH IS SUPPORTED BY GENERAL TAX REVENUES, IS UNDERFUNDED. AS SECRETARY OF THE DEPARTMENT IN WHICH THE COAST GUARD IS OPERATING THE ULTIMATE RESPONSIBILITY FALLS TO ME. TO SERVE OUR CITIZENS PROPERLY, I HAVE TO HAVE THE RIGHT TOOLS.

SOMEONE COMPARED TRYING TO CLEAN UP PRINCE WILLIAM SOUND UNDER ALYESKA'S CONTINGENCY PLAN WITH TRYING TO EMPTY A BATHTUB WITH A THIMBLE. I SUGGEST THAT TRYING TO PAY FOR A CLEANUP AND RESTORATION OPERATION OF THAT MAGNITUDE UNDER THE PATCHWORK OF FEDERAL AND STATE LAWS NOW ON THE BOOKS IS LIKE FINANCING THE EFFORT WITH THE PROFITS FROM A LEMONADE STAND.

OUR NATION NEEDS AN OIL POLLUTION AND COMPENSATION SYSTEM THAT IS INTERNATIONAL IN SCOPE AND COMPREHENSIVE IN SCOPE. ALONG WITH STRENGTHENING OUR OWN LAWS, IT IS EQUALLY IMPORTANT THAT WE RATIFY THE 1984 PROTOCOLS TO THE TWO INTERNATIONAL OIL SPILL TREATIES, THE 1969 CIVIL LIABILITY AND THE 1971 FUND CONVENTION.

SOME HAVE SUGGESTED THAT THE ONLY PROTECTION THAT THE

PROTOCOLS PROVIDE THE UNITED STATES IS PROTECTION FOR SHIPS IN INNOCENT PASSAGE. THAT IS A MYTH I WOULD LIKE TO DEBUNK RIGHT NOW.

LET ME GIVE YOU JUST ONE EXAMPLE OF THE KIND OF INCIDENT THAT THE PROTOCOLS CAN ADDRESS. IN 1973, THE FOREIGN TANKER ZOE COLOCOTRONI DELIBERATELY DISCHARGED ONE AND A HALF MILLION GALLONS OF CRUDE OIL INTO A COASTAL AREA OF PUERTO RICO IN ORDER TO FREE HERSELF FROM A GROUNDING AND HER OWNERS REFUSED TO ACCEPT FINANCIAL RESPONSIBILITY FOR CLEANUP COSTS OR DAMAGES. THE OIL DAMAGED TWENTY-THREE ACRES OF MANGROVE SWAMP INHABITED BY NUMEROUS MARINE WILDLIFE. THE CLEANUP COST THE COAST GUARD \$680,000 AND DAMAGE TO THE MANGROVES, BASED ON THE COST TO PLANT AND MAINTAIN IT AND THE ATTENDANT ECOLOGY, WAS \$6.2 MILLION. ALTHOUGH PUERTO RICO EVENTUALLY RECOVERED ITS COSTS, SETTLEMENT TOOK YEARS. IMAGINE IF THIS SPILL HAD BEEN THE SIZE OF THE EXXON VALDEZ, WHICH ONLY HALFWAY THROUGH THE SUMMER HAS COST EXXON \$600 MILLION.

WHY SHOULD AMERICANS SUFFER ALL THE COSTS OF OIL POLLUTION CAUSED BY FOREIGN TANKERS WHEN AN INTERNATIONAL SYSTEM EXISTS TO PAY FOR CLEANUP AND DAMAGES? IN 1988, FOREIGN FLAG VESSELS ACCOUNTED FOR SOME 59% OF THE OIL SPILLED BY TANKERS AND TANK BARGES. IF WE'RE TRULY SERIOUS ABOUT COLLECTING CLEANUP COSTS AND DAMAGES FROM THESE "PROTOCOL VESSELS" THEN WE MUST HAVE THE PROTOCOLS.

IN MY CAPACITY AS THE FEDERAL COORDINATOR FOR THE EXXON VALDEZ OIL SPILL CLEANUP OPERATION, I HAVE SEEN THE HAVOC THAT ENVIRONMENTAL DAMAGE WREAKS ON PEOPLE'S LIVES. AND YET, WE WERE RELATIVELY LUCKY IN ALASKA BECAUSE THE SPILL CAME FROM ONE OF THE RICHEST CORPORATIONS IN THE WORLD WITH A SUBSTANTIAL REPUTATION TO PROTECT AT HOME AND THE RESOURCES TO CARRY OUT A MASSIVE CLEANUP. WITHIN THE NEXT TEN YEARS, WE ESTIMATE SIXTY-FIVE PERCENT OF OUR OIL IS EXPECTED TO ARRIVE AT OUR SHORES IN FOREIGN TANKERS. MANY OF THESE TANKERS ARE OWNED BY SINGLE-SHIP CORPORATIONS AND THE TREND IS INCREASING. UNDER THE LAWS OF SOME COUNTRIES, SUCH AS PANAMA, RENAMING OR REFLAGGING A VESSEL IS EASY AND INEXPENSIVE. AS A RESULT, THERE CAN BE NO LEGALLY ACCESSIBLE DEEP POCKET IN MANY OF THESE CASES.

TO ARGUE THAT STATE LAWS OFFER A VIABLE ALTERNATIVE TO THE PROTOCOLS IS TO IGNORE THE FACTS. THE PROTOCOLS PROVIDE PRACTICAL ADVANTAGES THAT ARE UNOBTAINABLE UNDER STATE LAW: EFFECTIVE COVERAGE FOR UNITED STATES CITIZENS; JURISDICTION AND ENFORCEABILITY OF UNITED STATES JUDGMENTS ABROAD; ENHANCED SPEED AND CERTAINTY AND SETTLEMENT OF CLAIMS; PREDICTABILITY AND CONSISTENCY OF LIMITS AND COSTS FOR SHIPOWNERS AND OIL COMPANIES; REDUCED COST TO THE UNITED STATES OF CATASTROPHIC OIL SPILLS; AND EXPANDED UNITED STATES INFLUENCE IN INTERNATIONAL MARITIME NEGOTIATIONS.

THE ADMINISTRATION'S POSITION ON PREEMPTION IS CLEAR. WE SUPPORT THE PREEMPTION OF STATE LIABILITY LAWS ONLY TO THE EXTENT NECESSARY TO IMPLEMENT THE PROTOCOLS AND OPPOSE ANYTHING LESS OR MORE EXTENSIVE.

THE SPILL FROM THE PRESIDENTE RIVERA IN THE DELAWARE RIVER FOULED SHORELINE IN THREE STATES, WITH THREE DIFFERENT STATUTORY SCHEMES DEALING WITH LIABILITY AND COMPENSATION. IF THE PROTOCOLS HAD BEEN RATIFIED AND IMPLEMENTED, THESE CLAIMANTS COULD HAVE EASILY BROUGHT A DIRECT ACTION AGAINST THE SHIPOWNER'S INSURER, VASTLY SIMPLIFYING PRESENT PROCEDURES AND POTENTIALLY SAVING MANY YEARS OF LITIGATION. JUDGMENTS RENDERED IN UNITED STATES DISTRICT COURTS WOULD BE ENFORCEABLE ABROAD. ANY CLAIMS FOR DAMAGES IN EXCESS OF THE OWNER'S LIMIT OF LIABILITY COULD BE BROUGHT DIRECTLY TO THE INTERNATIONAL FUND, WHICH HAS AN EXCELLENT RECORD OF PAYMENT, (ON AVERAGE, EIGHT MONTHS).

THE 1984 PROTOCOLS TO THE 1969 CIVIL LIABILITY AND 1971 FUND CONVENTIONS WILL, WHEN THEY ENTER INTO FORCE, SET UP A LIABILITY AND COMPENSATION SYSTEM FOR TANKER-SOURCE PERSISTENT OIL POLLUTION DAMAGE. ONLY THE CIVIL LIABILITY CONVENTION, AS AMENDED, HAS A PREEMPTIVE EFFECT AND THAT EFFECT IS MINIMAL. FIRST, CLAIMS FOR POLLUTION DAMAGE COMPENSATION AGAINST THE SHIPOWNER MAY ONLY BE MADE IN ACCORDANCE WITH THAT CONVENTION. SECOND, NO POLLUTION DAMAGE CLAIM MAY BE MADE AGAINST THE OWNER'S SERVANTS--AGENTS, THE CREW, THE PILOT, THE CHARTERER, MANAGER OR OPERATOR, THE SALVOR,

OR PERSONS TAKING PREVENTIVE MEASURES, UNLESS THEIR PERSONAL INTENTION AND/OR RECKLESS ACT OR OMISSION RESULTED IN THE DAMAGE. IN NO OTHER WAY IS STATE LAW PREEMPTED.

I RECOGNIZE THAT THE ISSUE OF PREEMPTION OF STATE LAWS HAS BEEN A FACTOR IN PREVENTING PASSAGE OF IMPLEMENTING LEGISLATION IN THE PAST. BUT THE UNQUESTIONABLE BENEFITS TO BE GAINED FROM THE PROTOCOLS CANNOT BE LOST. IT IS TIME TO FIND A SOLUTION TO THIS PROBLEM.

I WOULD LIKE TO POINT OUT THAT WHEN THE UNITED STATES DELEGATION WENT TO LONDON IN 1984 TO NEGOTIATE THE PROTOCOLS TO CLC AND FUND, THEY DID SO WITH EXPLICIT INSTRUCTIONS FROM THE SENATE AND HOUSE OF REPRESENTATIVES. IN THE FACE OF STIFF OPPOSITION, OUR TEAM NEGOTIATED HARD AND WON DRAMATICALLY HIGHER LIMITS UNDER BOTH CONVENTIONS, RAISING SHIPOWNER LIABILITY FROM \$18 MILLION TO \$78 MILLION AND FUND COVERAGE FROM \$78 MILLION TO \$260 MILLION. WE ALSO WERE SUCCESSFUL IN NEGOTIATING AN AMENDMENT PROCEDURE WHEREBY THESE LIMITS MAY BE RAISED EVEN HIGHER IN THE FUTURE. BUT WE CANNOT INCREASE THE LEVELS IF WE HAVE NOT RATIFIED THE PROTOCOLS.

TO SUGGEST THAT WE COULD RENEGOTIATE THE PROTOCOLS IS TO IGNORE THE REAL WORLD OF INTERNATIONAL DIPLOMACY. OUR REPUTATION IN THE WORLD ENVIRONMENTAL AND MARITIME COMMUNITY IS AT STAKE. FAILURE TO RATIFY THE PROTOCOLS WILL JEOPARDIZE OUR NEGOTIATING POSITIONS ON SUCH FAR REACHING ISSUES AS SHIP DESIGN AND

INTERNATIONAL CREWING STANDARDS AND HAZARDOUS SUBSTANCE LIABILITY. RATIFICATION OF THE PROTOCOLS WILL NOT ONLY PROVIDE AMERICANS WITH GOOD INSURANCE AGAINST THE FINANCIAL DISASTER THAT CAN RESULT FROM AN OIL SPILL, IT WILL REASSERT THE UNITED STATES ROLE AS A LEADER IN WORLD ENVIRONMENTAL AND MARITIME ISSUES.

A VOTE FOR THE PROTOCOLS IS A VOTE FOR THE ENVIRONMENT. PRESIDENT BUSH HAS JUST RETURNED FROM THE ECONOMIC SUMMIT IN PARIS. AT THAT SUMMIT, HE EXPRESSED THE CONCERN OF ALL AMERICANS THAT NATIONAL, REGIONAL AND GLOBAL CAPABILITIES TO CONTAIN AND ALLEVIATE THE CONSEQUENCES OF MARITIME OIL SPILLS BE IMPROVED. HE URGED ALL COUNTRIES TO MAKE BETTER USE OF THE LATEST MONITORING AND CLEANUP TECHNOLOGIES. FURTHERMORE, HE STRESSED THE NEED FOR ALL COUNTRIES TO ADHERE TO AND IMPLEMENT FULLY THE INTERNATIONAL CONVENTIONS FOR THE PREVENTION OF OIL POLLUTION OF THE OCEANS, AND CALLED ON THE INTERNATIONAL MARITIME ORGANIZATION TO PUT FORWARD PROPOSALS FOR FURTHER PREVENTIVE ACTION. OUR CONTINUED FAILURE TO RATIFY THE PROTOCOLS WILL SEVERELY HAMPER OUR EFFORTS TOWARDS THESE OBJECTIVES.

I COMMEND THIS COMMITTEE FOR ITS LEADERSHIP ON THE CRUCIAL ISSUE OF COMPENSATION FOR OIL POLLUTION DAMAGE. WE ARE MOVING AGGRESSIVELY FORWARD ON LEGISLATION AND INITIATIVES ON PREVENTION AND RESPONSE. NEVERTHELESS, AS THE FOUR RECENT SPILLS MAKE ALARMINGLY CLEAR: HUMAN ERROR IS THE PRIMARY CAUSE OF THE ACCIDENTS THAT RESULT IN TRAGIC OIL SPILLS. WE CAN MINIMIZE HUMAN ERROR BUT WE CANNOT ELIMINATE IT. THE SHIPOWNER IS THE FIRST LINE OF DEFENSE AGAINST ACCIDENTS THAT CAUSE OIL POLLUTION.

ANY LEGISLATION DEALING WITH OIL SPILL LIABILITY MUST PROVIDE INCENTIVES FOR THE BROAD RANGE OF CORPORATE DECISIONS THAT EMPHASIZE RISK REDUCTION AND SAFETY--IN THE DESIGN, PURCHASE AND OPERATION OF TANKERS, BARGES, PIPELINES AND OTHER EQUIPMENT, IN THE HIRING, TRAINING AND SUPERVISION OF PERSONNEL, AND IN THE DEVELOPMENT AND USE OF CLEANUP TECHNOLOGIES. COMPANIES INVOLVED IN THE PRODUCTION OR PURCHASE OF OIL MUST FACTOR ENVIRONMENTAL RISK INTO CORPORATE DECISIONS ON THE TRANSPORTATION OF THAT PRODUCT. WHILE THE TANKER OWNER, FOR EXAMPLE, MUST HAVE PRIMARY RESPONSIBILITY FOR PREVENTING SPILLS, WE WILL NOT LET THE OIL COMPANIES OFF THE HOOK. OIL COMPANIES SHOULD BEAR A RESPONSIBILITY FOR CLEANING UP AND RESTORING OUR ENVIRONMENT WHEN OIL DAMAGES OUR NATURAL RESOURCES TO SUCH A GREAT EXTENT THAT THE COST EXCEEDS THE SHIPOWNER'S LIMIT OF LIABILITY.

THE ADMINISTRATION'S COMPREHENSIVE OIL POLLUTION LIABILITY AND COMPENSATION LEGISLATION, S. 1066, INTRODUCED BY REQUEST BY SENATOR CHAFEE, IS STRUCTURED AROUND THE CONCEPT OF SHIPOWNER RESPONSIBILITY. THE LIMITS IT SETS ON TANKER OWNERS' LIABILITY ARE IDENTICAL TO THOSE IN SENATOR MITCHELL'S BILL, \$500 PER GROSS TON. BASED ON OUR PAST EIGHTEEN YEARS EXPERIENCE, THAT LEVEL OF SHIPOWNER'S LIABILITY WILL COVER NINETY-FIVE PERCENT OF ALL SPILLS. ALSO IDENTICAL TO SENATOR MITCHELL'S BILL, IT CREATES A BACKUP FUND FOR CATASTROPHIC ENVIRONMENTAL DAMAGE. THIRD PARTY CLAIMANTS COULD BRING A DIRECT ACTION AGAINST THE VESSEL'S

INSURER, UP TO THE VESSEL OWNER'S LIMIT OF LIABILITY. BEYOND THAT LIMIT OF LIABILITY, THE THIRD PARTY CLAIMANT COULD BRING AN ACTION IN FEDERAL COURT UNDER STATE LAW, OR AGAINST THE INTERNATIONAL FUND, IF THE PROTOCOLS ARE IN PLACE. WE BELIEVE THAT THIS IS THE PROPER SHARING OF RESPONSIBILITY AND THEREFORE OPPOSE THE PAYMENT OF THIRD PARTY CLAIMS FOR ECONOMIC DAMAGES FROM THE OIL SPILL LIABILITY TRUST FUND.

WE SUPPORT A PRESIDENTIAL WAIVER OF THE \$500 MILLION PER INCIDENT CAP ON PAYMENTS FROM THE OIL SPILL LIABILITY TRUST FUND, SO THAT NO ENVIRONMENTAL DAMAGE GOES UNCOMPENSATED. ALTHOUGH THIS EXPOSES OIL COMPANIES TO UNLIMITED LIABILITY, THROUGH THEIR PAYMENTS INTO THE DOMESTIC FUND, FOR ENVIRONMENTAL DAMAGE THAT EXCEEDS THE SHIPOWNER'S LIMIT OF LIABILITY, WE BELIEVE THIS EXPOSURE IS JUSTIFIED.

THE ADMINISTRATION STRENUOUSLY OPPOSES LEGISLATION THAT WOULD SHIFT RESPONSIBILITY FOR CLEANUP AWAY FROM THE RESPONSIBLE PARTY AND ONTO THE COAST GUARD BY REQUIRING AUTOMATIC FEDERALIZATION OF CLEANUP OPERATIONS. THERE ARE TWO POINTS THAT I WOULD LIKE TO CLARIFY. FIRST, THE DECISION WHETHER OR NOT TO STAY ON SCENE AND COMPLETE THE CLEANUP IS OFTEN A BOARDROOM, NOT A COURTROOM DECISION. SECOND, AUTOMATIC FEDERALIZATION INVITES THE SPILLER TO WALK AWAY FROM THE DAMAGE.

WHY SHOULDN'T WE REQUIRE THE SPILLER TO STAY ON SCENE AND CLEAN UP THE POLLUTION HE HAS CAUSED? IF THERE IS ANY DOUBT THAT

THE RESPONSIBLE PARTY IS WILLING AND COMPETENT TO CONDUCT THE CLEANUP OPERATION, AS WAS THE CASE WITH THE WORLD PRODIGY SPILL IN RHODE ISLAND, THE COAST GUARD WILL MOVE QUICKLY TO FEDERALIZE THE RESPONSE. THIS SHOULD BE A DECISION WITHIN THE DISCRETION OF THE ON-SCENE COORDINATOR, NOT AN AUTOMATIC RESPONSE.

FINALLY, I WOULD LIKE TO ADDRESS THE ISSUE OF CIVIL PENALTIES. THIS COMMITTEE HAS PENDING BEFORE IT TWO BILLS DEALING WITH THIS ISSUE, S. 687 AND S. 1223, AS WELL AS OUR BILL, S. 1066. THE ADMINISTRATION STRONGLY SUPPORTS AN INCREASE IN THE CIVIL PENALTIES FOR DISCHARGES OF OIL OR HAZARDOUS SUBSTANCES INTO THE WATERS OF THE UNITED STATES. THEREFORE, THE ADMINISTRATION SUPPORTS S. 687. WE MUST SEND A VERY STRONG MESSAGE THAT POLLUTERS WILL BE PUNISHED. SENATOR LIEBERMAN'S LEGISLATION, S. 1223, AUTHORIZES THE PRESIDENT TO ISSUE ORDERS TO PROTECT THE ENVIRONMENT AND CREATES A LIABILITY SCHEME FOR CERTAIN POLLUTION DAMAGES. THE ADMINISTRATION NOTES THAT THE SENATOR'S APPROACH IS CONSISTENT WITH S. 1066, WHICH ALSO CONTAINS INCREASED CIVIL PENALTIES. GENTLEMEN, I COMMEND YOUR LEADERSHIP ON THIS IMPORTANT ISSUE AND LOOK FORWARD TO WORKING WITH YOU AS THESE BILLS MOVE THROUGH THE SENATE.

ONE FINAL NOTE. ALTHOUGH THE PURPOSE OF THIS HEARING IS TO FOCUS ON OIL POLLUTION LIABILITY AND COMPENSATION, I WOULD BE REMISS IF I DID NOT MENTION THE IMPORTANCE OF PREVENTION. WE CERTAINLY LEARNED THE HARD WAY, AFTER THE SPILL IN ALASKA, THAT

OUR CONTINGENCY PLAN SYSTEM IS INADEQUATE. THEREFORE, I IMMEDIATELY ASKED THE COAST GUARD TO UNDERTAKE A NATIONAL STUDY TO DETERMINE WHAT CHANGES NEED TO BE MADE TO OUR NATIONAL, REGIONAL, AND LOCAL CONTINGENCY PLANS. THAT STUDY SHOULD BE COMPLETED IN DECEMBER AND WILL BE MADE AVAILABLE TO THE COMMITTEE AS SOON AS IT IS FINISHED. THE COAST GUARD IS ALSO PERFORMING STUDIES ON VESSEL TRAFFIC SERVICES (VTS), PILOTAGE REQUIREMENTS, AND DOUBLE BOTTOMS.

IN CONCLUSION, AS COMPREHENSIVE OIL POLLUTION LIABILITY AND COMPENSATION LEGISLATION MOVES THROUGH THE SENATE, I LOOK FORWARD TO WORKING WITH YOU TO RESOLVE THE OUTSTANDING ISSUES AND ASK FOR THIS COMMITTEE'S SUPPORT FOR THE SENATE'S CONSENT TO RATIFICATION OF THE PROTOCOLS AND FOR IMPLEMENTING LEGISLATION. IN 1978, THE AMOCO CADIZ, A SHIP IN INNOCENT PASSAGE, SPILLED 68 MILLION GALLONS OF CRUDE OFF THE COAST OF NORMANDY, FRANCE. TWO MONTHS LATER, AND TOO LATE, FRANCE RATIFIED THE 1969 AND 1971 OIL SPILL CONVENTIONS. ELEVEN YEARS LATER, THE LAWSUITS ARE FINALLY BEING SETTLED, AND FOR FAR LESS THAN FRANCE SPENT DEALING WITH THE SPILL. IN NOVEMBER OF 1985, PRESIDENT REAGAN TRANSMITTED THE 1984 PROTOCOLS TO CLC AND FUND TO THE SENATE FOR ITS ADVICE AND CONSENT TO RATIFICATION. I URGE YOU TO MAKE TRULY COMPREHENSIVE OIL POLLUTION LIABILITY AND COMPENSATION LEGISLATION THAT IMPLEMENTS THE PROTOCOLS THE LAW OF THE LAND, BEFORE IT IS TOO LATE FOR US, AS WELL.

I WILL BE HAPPY TO ANSWER ANY QUESTIONS THAT THE COMMITTEE MAY HAVE.

STATEMENT OF ATTORNEY GENERAL JAMES E. TIERNEY
REGARDING OIL SPILL LEGISLATION

TESTIMONY BEFORE THE SENATE ENVIRONMENT
AND PUBLIC WORKS COMMITTEE

July 21, 1989

Mr. Chairman, thank you very much for providing me this opportunity to present my views on pending oil pollution legislation. I particularly would like to thank my own Senator Mitchell and his staff and my own staff who have worked together for many years on this very important legislation which you have before you.

I have been Attorney General of the State of Maine for almost 10 years and during that entire time have fought hard for strong federal oil pollution legislation which does not preempt State law. Other major federal environmental laws are non-preemptive and I can see no good reason why federal oil pollution legislation must be the exception.

I urge this Committee and this Congress to continue your efforts to address the national concerns which arise from the damage and threats of damage from oil spills while at the same time urge you not to preempt the efforts of those of us who, as States, have fashioned successful oil spill programs.

Let me first give you a summary of Maine's oil spill program before I address the merits of the legislation pending before you.

The Maine Coastal Protection Fund has worked well for almost 20 years and holds the overwhelming support of the

people of Maine. As Attorney General, I am counsel to that Fund.

Our State legislation begins with a Findings and Purpose Section which provides an essential backdrop to understanding the importance the Legislature attaches to the coast of Maine and to recognized adverse consequences which could result from the handling of oil and other petroleum products. A copy of this Section is appended to my testimony.

Maine's oil pollution statute provides as follows:

1. The discharge of oil into coastal waters or on lands adjacent to the Maine coast is prohibited;
2. Any person who has discharged oil must immediately remove the discharge to the satisfaction of the Maine Department of Environmental Protection;
3. If the removal is not accomplished immediately by the person who has discharged the oil, the Department of Environmental Protection is directed to remove the discharge;
4. Liability for a discharge of oil is strict, joint and several - the State does not need to plead or prove negligence;
5. A State Fund is created, with a recently-amended limit of \$6 million, to pay for all cleanup costs and for damage claims by any person suffering damages to real estate, personal property or loss of income directly or indirectly as a result of the discharge of oil;

6. The Fund is supported by a license fee on petroleum products entering Maine - the fees vary from 1/2¢ to 1 1/2¢ per barrel depending on the type of petroleum product.

The liability scheme in Maine and the existence of the Fund are the crucial elements in Maine's program. The liability scheme places handlers of oil on notice that no discharge of oil is without immediate legal consequences. The Fund provides a source of money to ensure prompt cleanup of any oil spill and a means by which persons suffering damage from oil spills may be promptly made whole. Without such a Fund, expeditious resolution of oil spill claims would be virtually non-existent.

Our experience in Maine has shown us that approximately 100 or more relatively small oil spills occur along our coast each year. Some are mystery spills; most are not. Without our liability scheme, without our access to State courts and without our State Fund, cleanup of many of these spills would be delayed and prompt compensation to those harmed by the spill would not occur. Preempting our State law and requiring us to have our citizens rely on a system administered by the federal government is not a proposal which can be accepted by the State of Maine.

Let me now turn to the merits of the legislation pending before you.

Mr. Chairman, every state places different values on different resources. For Maine, our coastal waters, our shores and our beaches, our islands, our plentiful supply of sea life and birds are enormously important. Thus, while we want to be able to provide speedy compensation to our fishermen and our resort owners and to our citizens, our highest priority is to avoid the spill of oil in our coastal waters and on our coastline in the first instance.

We believe that the Maine oil conveyance law, together with a federal statute of the magnitude which you propose, will together help prevent those spills. Faced with enormous potential liability, we believe vessel owners will exercise a higher standard of care in their vessel operations. Faced with the likelihood that the owner of a vessel can be held personally liable well beyond any limits of the liability set forth in the proposed international conventions, we believe the vessel owner will operate and maintain a better vessel with a better crew.

We have seen, as a result of the application of strict, joint and several liability for cleanup of Superfund sites, the development of a whole new attitude on the part of both communities and industries with respect to hazardous waste disposal. Today, the standard of care with respect to hazardous wastes has significantly increased. Businesses and communities don't want to face future liabilities in light of

the experience they have had with past liabilities. We should expect no less from people in the oil business who bring that valuable community to our shores by vessel.

Mr. Chairman, S. 686, together with the Maine oil conveyance laws and the laws of the several states will work to that end. Preemptive federal legislation and international treaties are contrary to that objective. We hope that this Committee will continue to demonstrate the leadership which you (Sen. Mitchell) and your predecessor, Senator Muskie, have exercised now for nearly 20 years to assure that both federal and state law are protected.

Mr. Chairman, with respect to specific provisions of S. 686, the limits of liability applicable to vessel owners and operators should be exercised. Clearly, recent spills suggest that higher limits are necessary. In the case of very large oil tankers, consideration should be given to removing those limits entirely.

We would recommend you consider, to the extent you retain limits of liability, that the legislation make it easier to break those limits. Under your bill, which continues the current law on piercing liability limits, limits can only be pierced where the government can demonstrate willful misconduct or gross negligence "within the privity or knowledge of the owner or operator." We would recommend that you consider changing the standard to simple negligence and, because of the

difficulty of determining what actually occurs on a vessel on the high seas, we recommend you place the burden on the vessel owner or operator to demonstrate that the spill did not occur as result of negligence.

We would recommend, in addition to negligence and failure to report a spill, that limits of liability be unavailable whenever a vessel owner or operator fails to have a certificate of financial responsibility.

Finally, we would recommend that the bill provide a remedy for the case of a spill from a vessel in innocent passage. A provision could be included which would give the United States Governor access to any assets in the United States or a party jointly or severally liable for a spill when there is no certificate of financial responsibility or when the vessel from which the discharge occurs is in innocent passage. There is precedent for United States action against vessels on the high seas in the Intervention Convention of 1969 and this would be a logical extension of that authority.

Mr. Chairman, I want to make a final point. Maine has fought preemption for 20 years. With all of the environmental problems facing this nation, we should be spending our time on other public matters. It is time for Congress to tell the Coast Guard once and for all to stop trying to subvert national environmental policy under the guise of foreign policy.

This is not an issue of international comity. For too long, the State Department and the Coast Guard have represented U.S. commercial interests at the bargaining table when those commercial interests could find no advocate of their special interest in Congress or our legislatures.

For too long, now more than 20 years, our international negotiators have ignored the clear demands and instructions of the United States Senate and developed international agreements which are not only in conflict with our domestic policy, but which would repeal it.

I am not the first Attorney General of Maine to address this issue in this Committee. The people of Maine are not fooled by the representatives of the State Department and the Coast Guard who have lobbied state government organizations and state government employees, including elected officials, on these treaties. In that "lobbying" they have misled these people with respect to these treaties.

We have been told time and again that absent these international protocols, somehow foreign vessels would spill oil on our shores and neither the states nor the Federal Government would be able to recover cleanup costs or damages. That's probably true. It is a circumstance which the United States has not yet experienced in the 20 years since the Maine oil conveyance law was enacted.

Mr. Chairman, I cannot conceive of the circumstance in which that unique tanker and oil would exist and, for the sake of protecting our liability and cleanup statutes, I'm willing to take the risk. The State Department, the Coast Guard, the Department of Transportation know that this argument is erroneous. I, for one, wish that this Committee and the Senate would tell them to stop perpetrating this kind of non-option on the states so that we could go on with the business at hand. We need to enact a national oil superfund scheme which protects state laws while at the same time providing a degree of financial availability to clean up major oil spills such as the Exxon Valdez.

There is a risk that a spill will occur from vessels in innocent passage. There is a risk that a vessel could escape liability if we do not have an international oil pollution treaty. I am prepared to accept that risk because I know Maine is safe because we have a domestic cleanup fund available to clean up the mess.

This Committee traditionally has served as the environmental conscience of the Congress and of this country. I urge you to adopt oil pollution legislation which protects the environment rather than legislation which protects tanker owners. I would prefer a treaty which recognizes United States policy and law. But if these criteria cannot be met, we are better off with good federal and state law. Thank you.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting

July 9-12, 1989

Lake of the Ozarks, Missouri

X

RESOLUTION

SUPPORTING OIL-SPILL LIABILITY LEGISLATION AND
OPPOSING PREEMPTION OF STATE LAW

WHEREAS, many states have suffered losses from oil spills on their lands and waters destroying fish, wildlife and other resources, most recently including a spill of disastrous magnitude in the State of Alaska; and

WHEREAS, the states have evolved legal systems and law to avoid such losses, provide redress, and penalize those responsible, many of which laws reflect the unique situations, risks, and resources of the states; and

WHEREAS, on October 28, 1987, the President issued Executive Order 12612, directing a strong policy of federalism; and on December 13, 1987, the Attorneys General adopted a resolution urging the federal government to adhere to the principles of federalism in enacting legislation affecting the states; and

WHEREAS, in December 1988, the Association reaffirmed its commitment to federalism through its report, *Environmental Protection in the 1990s*, which urged a "partnership approach to protecting the environment"; and

WHEREAS, under current law and our federal constitutional system the states adopt and enforce their own laws relating to air and water pollution control as well as oil spill prevention, compensation, and liability; and

WHEREAS, legislation in the form of several alternative bills is presently pending in the U.S. Congress intended to codify federal law applying to liability for oil spills; and

WHEREAS, federal legislation, protocols or conventions preempting state law would not only violate legal and philosophical principles of federalism but would be counterproductive to long-standing state efforts to avoid and remedy such disasters and could serve to shield polluters from the full consequence of their acts or negligence; and

WHEREAS, federal legislation which would preempt states' laws could prevent private citizens as well as states from receiving full compensation for losses due to oil spills;

NOW THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION
OF ATTORNEYS GENERAL:

1. Supports appropriate federal legislation to tighten and improve federal law with respect to oil spills and similar disasters;
2. Strongly opposes legislation, protocols or conventions which would have the effect of preempting state oil spill or environmental damage laws;
3. Strongly opposes legislation, protocols or conventions which would prevent injured individuals, local governments, or states from receiving full compensation for damages caused by oil spills;
4. Supports appropriate federal legislation which would implement a federal oil spill fund to deal with catastrophic oil spills and a liability scheme which would supplement rather than replace state laws; and
5. Authorizes the Executive Director and General Counsel to transmit this resolution to the Administration, appropriate federal agencies, members of Congress, and interested associations and individuals.

TESTIMONY OF DOUGLAS B. BAILY
Before the
SENATE SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION
July 21, 1989

Mr. Chairman and Members of the Committee:

My name is Douglas B. Baily, and I am the Attorney General of Alaska. I would like to give you the perspective of Alaska on certain legislation now before Congress designed to protect our shores from oil spills. We are in the unenviable position of having some of the most recent experience on this topic of any state. Our experience has left us with firm convictions on how federal legislation and international agreements should be coordinated with existing state laws.

Prince William Sound, impacted by the grounding of the EXXON VALDEZ on Good Friday, March 24, 1989, was essentially a pristine wilderness area of unparalleled scenic beauty, commercial fisheries, wildlife, and recreational value. Alaska, and indeed millions of Americans from other states, treasure those features. The Attorney General of Alaska is one of those charged with protecting those values.

At the same time, Alaska is an oil state producing more than 20 percent of domestic U.S. consumption. Royalty and tax revenue received from oil products is the chief source of state revenue. Governor Cowper, through active participation in the Interstate Oil Compact Commission and otherwise, has promoted responsible oil development. We expect this participation in the energy business to continue well into the 21st century. The Attorney General of Alaska is one of those charged with advancing those vital interests.

What Alaska does must accommodate both our continuing strategic energy needs and our obligation to manage and protect our environment in a responsible manner consistent with today's heightened public awareness and scrutiny. Alaska strives for a balanced response.

Alaska has laws on oil pollution damages comparable to the nation's best. We require tankers operating in our waters to have proof of their financial ability to pay for the damage they cause; we permit injured citizens to sue for damages in state courts and recover the full amount of their injuries; and we require the parties who are in the best position to make transportation of petroleum products safe, the owners of the oil, to also bear liability when their product causes injuries. We have a zero tolerance criminal statute for blood alcohol level in tankership officers. But Alaska's system of protecting its citizens, and those systems in place in other states are threatened by bills now before Congress. On one extreme we have bills that would preempt state compensation laws entirely and

substitute a federal scheme in which the vessel owners' liability is limited -- which is another way of saying that some injuries from oil spills will not be compensated; the same bills would eliminate the ability of states to require a showing of financial responsibility and would immunize the owners of the oil from liability for spills. Even if coupled with an international fund, the result would be that in some situations, damages would go uncompensated because state law protection is unavailable.

Presently, international protocols dealing with oil spill liability are being considered. As I understand these protocols they would require essentially the same scope of preemption, leaving state statutes in place for only the vessels not covered by the protocols. International agreements can be beneficial, particularly to those jurisdictions that have not enacted their own strong domestic laws; but we believe the United States should not ratify or implement international agreements that decrease the protections available to U.S. citizens or reduce the motivation of oil owners and transporters to avoid spills. As long as the protocols cut off the access of injured persons to state laws, and as long as the protocols provide less protection than those state laws, we believe they should not be implemented.

The National Association of Attorneys General last week adopted a resolution unanimously opposing any federal law, protocols or conventions which would preempt State laws on oil spills. Tuesday, the Western Governor's Conference did the same. When the United States Senate first considered these protocols, in 1986, the Senate Foreign Relations Committee reported them out favorably but with one important reservation: The Committee insisted that the protocols should be read so as not to cut off injured parties from remedies under state law. Under the Foreign Relations interpretation of the protocols, an injured party would look first to the vessel owner for compensation, then to the international fund set up by the protocols, then to any federal fund that existed, and then -- if some damages remained uncompensated -- the injured person could invoke any remedies available under state law. The public would have the benefit of the international fund but would also, in the case of a catastrophic spill, be able to use state law to insure complete payment of all damages. Motivation to avoid spills would be enhanced. This interpretation makes sense, far more sense than interpreting the protocols to wipe out all state law in most cases and leaving injured citizens without the full compensation they now have.

The Alaska Legislature is now in an active period of reexamining all our laws on preventing and responding to oil spills and on compensating for the damages they cause. Congress as well as the states are looking for the best possible approaches. If federal laws or protocols were implemented that preempted state laws, it would eliminate an entire field of innovative approaches to oil spills. It would cut off originality at a time when we need fresh vision. Worst of all, it would commit the United States to

a single mechanism for dealing with spills when Congress itself is still looking for the best possible answers in an emerging area of concern. In short, I urge you to direct your energy and expertise in a way that preserves the present ability of states to create their own oil spill liability laws and to apply them to insure full compensation for all their citizens.

Any action that precludes full compensation for individuals damaged by oil pollution would have to include a conscious decision and public policy that the cost of oil spills be borne in one degree or another by the injured parties as opposed to the party responsible for their cause. Such a public policy would, I believe, reduce the motivation of oil owner and transporter to constantly seek new means of avoiding spills, ultimately our goal.

I believe the public policy objectives are full compensation for injuries, retaining options for new and novel responses to prevention, motivation for owners and transporters to strive for avoidance and an environment which allows the public to accept the risks attendant with production in an oil dependent economy.

Thank you for your attention and consideration.

SUPPLEMENTAL TESTIMONY OF DOUGLAS BAILY
BEFORE THE
SENATE SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION
July 21, 1989

The State of Alaska strongly endorses legislation which would repeal the Ship Owner's Limitation of Liability Act of 1851, 46 USC §183. As the Ninth Circuit recently noted, this Act is a "relic" of a bygone era which "provides protections that are neither warranted nor consistent with current reality." ESTA Later Charters, Inc. V. Ignacio, 875 F.2D 234, 239 (9th Cir. 1989). Throughout the 20th Century its scope has been constantly narrowed by enlightened judicial interpretation and by actions of Congress. For example, the Clean Water Act and the Trans Alaska Pipeline Authorization Act both contain provisions which render the Limitation of Liability Act inapplicable to claims filed thereunder. The Limitation Act survives as a highly technical procedural defense which primarily serves the interest of powerful insurance organizations. When successfully invoked, its principal purpose is, in direct effect, to leave innocent victims uncompensated. The Act, adopted forty or so years before the first tanker ship ever sailed, reflected policy considerations which, I believe, have no application to present circumstances.

In the more immediate context of the Exxon Valdez oil spill, there is good evidence to suggest that Exxon is preparing to file a limitation of liability action in the near future. We note for example Exxon's pending abrogation of its initial commitment to clean up the beaches and waters of the State of Alaska and to pay all claims arising out of the environmental catastrophe it has caused. An internal memorandum from Exxon, O.R. Harrison, dated July 19, 1989, to Exxon Valdez Managers, recently made public, discloses that Exxon has made a decision to abandon the oiled beaches as of September, 1989 and not to return in 1990. The Limitation of Liability Act of 1851 would be a likely escape hatch through which to try to abandon these responsibilities.

The availability of the Act as a defense will be a hotly contested issue. If Exxon Shipping Co. seeks the shelter of this archaic provision, it will cause serious delays in getting the victims of the spill compensated and it will impose significant litigation costs on those victims. At worst, it will leave many victims wholly or partially uncompensated for the damages suffered. Although I am convinced that the State and other parties would ultimately prevail on the merits, it is not my intention to argue the fine points here. As the ESTA court posed, the fundamental policy issue for Congress is "whether any rationale

underlying the Liability Act continues to have vitality as we enter the last decade of the twentieth century." I respectfully suggest that the Act has outlived any possible usefulness it may have served the uninsured owner of a Yankee Clipper in the 19th century. It should not be available today to Exxon, the owner of a supertanker company that ranks among the largest and wealthiest of the corporations in the world. On behalf of the State of Alaska, I would like to see the Limitation of Liability Act repealed as soon as possible and rendered expressly retroactive so that it can not be raised as a "nuisance" defense in the Exxon Valdez oil spill.

Testimony
of
Kenneth O. Eikenberry
on behalf of the
State of Washington, Office of the Attorney General
before the
Environmental Protection Subcommittee of the
Senate Committee on Environment and Public Works
concerning the
Oil Pollution Liability and Compensation Act of 1989

Mr. Chairman and members of the Committee, my name is Kenneth O. Eikenberry. I am Attorney General for the State of Washington. I appreciate the opportunity to provide you with a Washington State legal perspective on comprehensive oil spill legislation now pending in Congress. I also want to share with you the legal conclusion of all the states' attorneys general that such federal legislation should not preempt the laws of the states in this area.

Although the Exxon Valdez is foremost in all our minds, Washington State has also experienced several damaging, though fortunately not catastrophic, oil spills--the ARCO ANCHORAGE grounding in Port Angeles Harbor, Washington in December, 1985, which discharged 239,000 gallons of oil; the MCN #5 barge sinking off Anacortes, Washington, in January, 1988, which released 67,500 gallons of oil and the NESTUCCA Barge towing off the coast of Washington, in December, 1988, which discharged 227,000 gallons of oil to Washington State waters.

Each of these incidents, while distinct as to its factual scenario, involved some degree of negligence. In the

first incident, a local harbor pilot navigated a 50-foot draft vessel into 48 feet of water in a well charted harbor and holed two cargo tanks. In the second incident, an improperly modified and overloaded barge became unstable because it had no freeboard for its voyage through choppy seas, flipped on its side and later sank. In the third incident, a tow line snapped and the tug backed into and holed the barge in an effort to reconnect the line. It is that common element of negligent human error that I ask you to consider when evaluating the issues surrounding limits and scope of liability in state, federal and international law. We are obligated to the people of the state of Washington, as you are to the people of the United States, to do everything we can to prevent oil spills from polluting our waters.

Toward that end, it is my position that a truly comprehensive liability scheme must embrace the concepts of deterrence and prevention and an equitable allocation of the risk of oil spills. Washington has worked to adopt its own laws directed to these ends. Other states have also done so. I am pleased to note that Senate Bill 686 goes a long way toward achieving that end.

While we are aware of two Bills pending in the Senate, one bill addresses liability only while the other bill addresses liability and compensation. The House also had two bills pending that address the problems raised by our current legal liability scheme, and implement international protocols. Those bills do not appear to adequately address the concepts of deterrence, prevention, and allocation of risk. We are also concerned with the potential impact on state laws posed by implementation of international protocols in present form and restriction of state causes of action in oil spill cases. Indeed, the attorneys general of all the states meeting together this July adopted a resolution opposing legislation on protocols that would preempt state laws.

My comments today are organized into two broad topics: one retrospective, the other prospective. The first topic addresses the lessons learned from past oil spills. I address three critical problem areas in the current regulatory scheme: immediate response, shipowner liability limitation, and cleanup. I will also address problems in the recoupment of natural resource damages. The second topic is prospective and is of great concern to Washington citizens. That topic is deterrence and prevention of future oil spills.

Topic I. Lessons Learned from Past Oil Spills.

A. Three Critical Problem Areas.

1. Immediate Response.

When an oil spill occurs in navigable waters of the United States, including waters of a state, the United States Coast Guard is the pre-designated lead response agency. The current applicable law is the Federal Water Pollution Control Act (FWPCA), also known as the Clean Water Act. It is this act that provides authority for the Coast Guard to act to remove or arrange for the removal of such oil. However, the very statute that authorizes the Coast Guard to act also restrains their ability to act by requiring a predetermination by the Coast Guard as to whether the spiller is properly removing the oil. We believe that it is this predetermination requirement which in part hinders the Coast Guard in an immediate removal action during oil spills. Some have argued that it is this provision that delayed action on the part of the Coast Guard in the Exxon Valdez incident.

Senate Bill 686 amends the Clean Water Act and provides that the Coast Guard (delegated by the President) "shall remove or arrange for removal of such oil or substance at any time. The President is not required to remove oil only if there is a finding that removal is not being done promptly or properly by the owner of the vessel..." In other words, the Coast Guard can act without any predetermination. Senate Bill 686 shifts the burden to the owner/operator to demonstrate to the satisfaction of the Coast Guard that the owner has the financial resources and technical capability necessary to effectively remove the oil. If this legislation passes, the Coast Guard will have clear authority to respond to a spill and to begin immediate cleanup of the oil just as would a fire department in responding to a fire.

2. Shipowner Limitation of Liability in Admiralty.

I earlier alluded to three oil spills in Washington state. In two of these cases, the "owner" (the barge charterer) seeks to limit his liability for the costs of removal and the damages incurred as a result of the oil spill invoking provisions of a federal act--100 years old. Each owner has filed a limitation and exoneration of liability action in federal district court. Claims filed by the United States and Washington State for clean up and damages in the MCN #5 case approximate \$1.25 million. The owner seeks to limit his liability to approximately \$9,000, the salvage

value of the barge. In the Nestucca case, claims not yet filed for removal costs and natural resource damages may run in the millions of dollars. The owner seeks to limit his liability to approximately \$900,000, the value of the tug and her cargo. Senate Bill 686 addresses this issue and provides owner/operator liability under federal law, maritime tort and state law, notwithstanding this shipowner exoneration and limitation of liability act. If this legislation passes, no longer will vessel owners be able to attempt to escape their liability through an archaic federal statutory loophole.

3. Cleanup.

Although the federal government has designated primary response authority, state personnel are often the first to arrive at an oil spill and usually the last to leave. Notwithstanding that the federal government usually takes the lead on cleanup, the public looks to state officials to see that oil is cleaned from their beaches and natural resources after a spill. Senate Bill 686 provides that the President shall consult with the affected state on the appropriate removal action to be taken and that removal with respect to any discharge or incident shall be considered completed when the President AND the Governor of an affected state so determine. This partnership of state and federal government in cleanup determinations will result in more effective future cleanup actions.

B. Natural Resource Damages and Recoupment of Costs.

Natural resource damages sometimes exceed the cost of oil spill cleanup. This will probably be true of the Nestucca case, the unfortunate oil spill involving damage not only to state and federal resources but also to Tribal and Canadian natural resources. At the very moment when we need clarity in our liability and compensation laws with respect to natural resource damages, we instead find confusion. Given the recent controversy over the Department of the Interior regulations, stricken by the federal Circuit Court for the District of Columbia last week, states also appear to be getting mixed signals from the federal government as to recoupment of resource damage costs. A state's natural resource damage claims cannot currently be recovered from any federal fund. Expenses incurred for actual removal of oil are compensable under the federal Clean Water Act, but natural resource damage claims are not. The 311(k) fund of the federal Clean Water Act is not available for natural resource damage claims. Those claims must be recovered directly from the owner/operator, assuming he is solvent.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) required the President, through officials designated by the National Contingency Plan (NCP) to promulgate regulations for assessment of damages to natural resources for the purposes of both CERCLA and the damage sections of the FWPCA. CERCLA provides a claimant an election to seek recovery for damages to natural resources directly from the owner/operator OR directly from the Superfund. Recovery from the CERCLA fund is limited to claims from hazardous substances, not oil. Even though claims for natural resource damages incurred as the result of an oil spill may not be recovered from either the superfund or the 311(k) fund of the FWPCA, the regulations promulgated under CERCLA apply in assessing damages caused by an oil spill. While not mandatory, the assessment procedures provide a rebuttable presumption if used by a trustee in a cost recovery action for natural resource damages. Recently, ten states and three environmental groups challenged these regulations, which attempted to limit both the scope and amount of damages recoverable by a trustee. The United States Court of Appeals for the D.C. Circuit upheld the challenge and rejected the rules drafted by the Department of the Interior. It is not clear whether that ruling will be appealed by the Administration.

The point here is that many states are wary of both the maze of statutes and regulation and the paradoxical approach of the federal government in interpreting those statutes and regulations.

We support legislation that clearly allows states to elect whether to recover natural resource damages from a federal (or state) fund or directly from the responsible party. States need the ability to recover for damages incurred to all the natural resources owned, controlled, managed by, belonging to or appertaining to the state regardless of whether those resources are publicly owned or privately owned or whether the state has committed the same to a public use. States need the ability to recover the same costs necessary to mitigate damage to natural resources. Under Washington State law, a responsible party is strictly liable for damages in an amount to restore any damaged resource to its condition prior to injury. Restoration includes the cost to replace the resource or otherwise restore the waters of the state. For unquantifiable damages, Washington has devised a mandatory sliding schedule of up to fifty dollars per barrel of oil spilled to compensate the public for the lost resource. We note that under the International Protocols, compensable damage for natural resources is limited to "reasonable measures of reinstatement

actually undertaken or to be undertaken," probably much less than the measure of damages under Washington law.

Our natural resources are an integral part of our Northwest heritage. We cannot support a statutory regime that does not fully compensate Washingtonians for the full measure of their natural resource damages incurred as a result of an oil spill.

In contrast, Senate Bill 686 provides for the National Oceanographic and Atmospheric Administration (NOAA), rather than the Department of the Interior, to promulgate regulations for natural resource damage assessment. If used by a state trustee, this damage assessment shall have the same rebuttable presumption as that accorded a federal trustee. Senate Bill 686 provides that the measure of damages in an action brought for natural resource damages is not limited by sums which can be used to restore or replace natural resources, but does require that the sums recovered by a state as trustee be used only to restore or replace or acquire equivalent resources. That language assures the public that natural resources will be around for future generations.

There are, however, two areas of concern for state recovery of natural resource damages in Senate Bill 686. The first is the idea that there shall be no double recovery for natural resource damage including costs of damage assessment or restoration, rehabilitation or acquisition. In certain instances, a damage assessment is done by both the federal and state governments. This was true in the MCN #5 barge oil spill, although there the damages were difficult to "fingerprint" to be sure all losses caused by MCN #5 were attributed to that spill. While we appreciate that the intent of a no double recovery provision is to preclude spurious or duplicative claims, it is not clear whether that provision would work to preclude state recoupment of legitimately incurred costs proven in accordance with state-determined burdens of proof. Similarly, we note that where the President has paid money for removal costs or any costs for short- or long-term damage assessment and restoration, rehabilitation or acquisition of damaged natural resources, no other claim may be paid for the same costs.¹

¹In the case of the Nestucca barge oil spill, Indian tribes, the governments of Canada and the United States, and
(Footnote Continued)

C. Deterrence, Prevention and Equitable Allocation of the Risk.

Regardless of how much money we are willing to allocate to a problem, the true test of a comprehensive liability and compensation scheme is the deterrent effect that legislation has on behavior which leads to oil spills. This can only be accomplished by a broad scope liability scheme, which holds accountable for their liability those persons whose actions cause oil spills.

We appreciate that your Committee is intimately familiar with oil spill legislation and has spent the better part of the last decade refining the issues and drafting legislation to address the issues. You are aware of the loopholes and gaps in the current federal liability scheme. In part in response to those gaps and loopholes, many states have created state liability schemes which augment the federal scheme, especially the federal Clean Water Act (FWPCA). The FWPCA does not preempt state law. We believe it is not in the best interests of the people of Washington State to have our laws preempted. On the contrary, we want to see the federal scheme strengthened and our state laws preserved. It is through this partnership of state and federal laws that we can best achieve the goal of prevention of oil spills.

Washington law provides strict joint and several liability for any person having a causal nexus to the discharge or release of oil to waters of the state. There is no liability limit; rather, there is liability for all costs and damages. The broad scope of our state liability extends to persons "having control over oil" including any person owning, using, storing or transporting oil. These persons are strictly liable for oil spill cleanup and for damages incurred to persons or property, public or private, caused by such entry of oil. In addition to those causes of action, any other person causing the entry of oil are directly liable to the State of Washington for the necessary expenses of oil cleanup arising from such entry. It is this statutory scheme

(Footnote Continued)

Washington State have incurred damages to natural resources. Many of these resources are shared resources and include migratory birds and anadromous fish, in which ownership is not clearly defined between the various potential claimants. Although the damaged parties are working together and will undoubtedly make one consolidated claim against the responsible party, it is not clear that this cooperative effort will always occur.

that allows us to hold masters, pilots, charterers or other persons responsible for an oil spill liable for their actions in causing an oil spill. The President of Arco Marine, Inc., owner of the tank vessel ARCO ANCHORAGE, has gone on record as supporting this broad scope liability scheme. In his testimony before the Subcommittee on Coast Guard and Navigation Committee on Merchant Marine and Fisheries, U.S. House of Representatives on June 16, 1989, he acknowledged the human error factor in his remarks on personnel, qualification and training as related to oil spills. Mr. Aspland opined that "The pilot must be held responsible and liable for his/her actions." Yet, the two House bills would limit the scope of liability, vis-a-vis implementation of International Protocols, solely to the shipowner. No cause of action for damages is allowed against pilots, charterers, salvors, members of the crew or agents or servants of the shipowner unless one can prove an "intentional or reckless act with knowledge that damage would result." After review of the ARCO ANCHORAGE case, I conclude that the state of Washington may not have met that intentional or reckless burden against either the master or the pilot of the ARCO ANCHORAGE even though there was clear evidence that both persons were legally responsible for navigating the vessel into water too shallow for her draft, causing the resulting oil spill. I submit that it would be extremely difficult to meet the burden of proof imposed by the International Protocols for even the egregious acts of the master of the Exxon Valdez. More importantly, if the protocols were in effect for the Exxon Valdez, it is doubtful that Alaska could pierce the low limits of liability imposed by the Protocols, as the same burden of proof of an intentional or reckless act with knowledge damage would result applies.

While we appreciate that the Protocols also provide a fund, contributions are provided by persons receiving oil above a certain annual tonnage. Shipowners can make claims against the fund for "expenses reasonably incurred or sacrifices reasonably made to prevent or minimize pollution damage." (Art. V.8) Thus, a responsible shipowner's claim against the Protocol fund would rank equally with that of a claimant who had suffered damages as a result of that shipowner's negligence. I submit to you that the effect of this international scheme will be to make oil spills just another cost of doing business. The proposed statutory scheme will have no deterrent effect on the negligent behavior on the part of masters, pilots, charterers or salvors. Since these are the very persons whose behavior we need to affect in order to prevent oil spills in Washington State, we cannot support such a liability proposal. Senate

Bill 686 does not implement the protocols and we support that approach.

Conclusion.

Mr. Chairman, I appreciate the opportunity to provide you with a Washington State legal perspective on this very important issue of comprehensive oil spill liability and compensation laws.

We feel that Senate Bill 686 meets many of the State of Washington's concerns regarding immediate response to an oil spill and participation in the cleanup decisions. States will no longer be faced with the possibility of having a polluter shipowner limit liability to far less than the damages caused.

Most importantly, however, is the fact that Senate Bill 686 does not preempt states' laws but rather augments and strengthens the federal liability scheme. With a few changes, this comprehensive liability and compensation bill can provide the federal and state governments with a partnership arrangement, which embraces the concept of deterrence, prevention, and equitable allocation of the risk.

As previously noted, the National Association of Attorneys General of the states opposes any such preemptive legislation. I attach a copy of the Association's Resolution, unanimously adopted, for your information.

TESTIMONY OF DENNIS KELSO
Before the
SENATE SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION
JULY 21, 1989

Mr. Chairman and Members of the Committee:

I am Dennis Kelso, Commissioner of the Alaska Department of Environmental Conservation. I appreciate the opportunity to appear before this committee today, and I thank you for your continuing interest in the policy questions raised by the Exxon Valdez disaster.

Attorney General Baily has presented you with a good overview of the state's interest in maintaining a major role in protecting against and responding to spills. As the Congress moves to strengthen and centralize prevention, planning, and response to major spills, the State of Alaska urges you to make sure the states are at the table with the federal government. A major lesson of the Exxon Valdez spill has been that strong, insistent leadership by the State, in cooperation with local interests and local communities, has been essential to moving the cleanup efforts in the proper direction and seeing that important resources are recognized and protected. In my brief comments, I would like to link the issue of the State's role to a particular process: Response planning and implementation.

The State of Alaska believes that we must have firm control of the contingency planning process, and that government should have an even greater role in directing the implementation of response plans.

Generally, here is how the system works now, and how the state believes it should be changed.

As it stands today, under the guidelines of the National Contingency Plan, the planning for spill response arises from within the federal government, the industry and the states. The federal government also develops regional contingency plans in conjunction with affected states, and the State has the opportunity to comment on these plans. The States may have their own statewide contingency plans. States also require plans from industry that must be consistent with the federal contingency plans.

Although some of these plans are developed by government, for example the national and regional contingency plans, others are prepared by the regulated industry. By default, this process puts government -- whether it is the Coast Guard or the state -- in a reactive position on a major public safety, health and environmental protection issue.

Not only does this create the potential for overlapping or inconsistent plans, it also raises the question as to why government is not directing and setting standards for what should be in a good plan in the first place.

What we wind up with is, essentially, a workable plan. The plan in place for Prince William Sound on March 24 was a good one.

The Alyeska Contingency Plan sets out a detailed description of the oil containment and clean-up procedures to be followed. It contains a detailed plan to coordinate the clean-up effort. It lists the equipment that will be on hand and how it will be put to work. It has procedures for use of chemicals in the clean-up process. It details response times in the Sound. It lists the sensitive areas that will be protected.

We -- the State -- eventually got a sound plan from Alyeska over the decade that the plan has evolved. But getting there meant bushwhacking through a thicket of overlapping authority and scaling a mountain of industry opposition.

Recently, both Exxon and Alyeska Pipeline Service Company have asserted that the state-approved contingency plan was somehow not really a set of requirements.

Under Alaska statutes, it is unquestionably a binding document. Our law states that the company must have a state-approved plan in place as a condition of operating the terminal at Valdez. Failure to do what the approved plan says is a violation of State law.

When Exxon entered the picture in the first days of the spill, they did not follow the Alyeska plan, and later said they followed their own. Whatever plan they were following, if any, it apparently was not a state-approved plan.

There is a shorter, more efficient route to an effective and consistent contingency plan. Federal and state governments should set requirements, industry should write a plan meeting those, affected states should be included in the approval process, and authority should exist under both federal and state law to direct and enforce implementation.

The State statute is clear, but federal law may not be. The state suggests that the national contingency plan be altered so that there is one plan, one set of requirements, that all must follow. Further, that plan should be signed off by both federal authorities and affected state governments, and be backed with legal authority to require implementation.

A plan is only as good as its implementation. Planning must be backed by concrete response capability, including

identification of equipment, personnel, response methods, and mobilization strategies. Also essential are local knowledge and the priority setting that comes from tailoring response to the needs of affected communities.

Our experience in the Exxon Valdez spill demonstrated that all the parties involved in spill response must have good logistical arrangements to support effective response. For the regulated facilities, this means assurance of adequate equipment and readiness in locations where deployment is feasible and immediate. For the federal and state government, this means deployment of trained teams to manage the response. It also means the capability to physically direct spill response in instances where that would serve the overall cleanup. For communities in the path of the spill, this means access to equipment and expertise necessary to ensure that key sensitive areas can be protected from impacts.

My point is this: Response to this type of disaster must be carefully planned, tightly coordinated, and meticulously implemented. There is no time to consult attorneys, re-write a contingency plan, or wait for someone else to make the first move.

Industry is good at many things, but it is not structured to respond to a crisis that requires firm legal authority and emergency management -- virtually a military discipline.

The petroleum industry has announced plans for regional response teams and facilities all around the United States -- excluding Alaska, I might add. It's good they've shown that concern, but they fail to address the real root of the problem.

Alyeska Pipeline Service Company has taken a number of steps to beef up its preparedness and response capability, largely in response to a state emergency order requiring them to do so.

That, too, is good. But it is no solution to a problem that must be seen as a matter of vital public safety -- a matter that requires better public oversight and direction.

The state and local governments, and the people of Prince William Sound and the Gulf of Alaska, played critical roles in the response to the Exxon Valdez disaster.

The state and federal governments can do that together. But the State of Alaska urges the Congress to make sure that new federal initiatives do not preempt our own authority, and our own efforts to protect our shorelines and our homes.

TESTIMONY OF THOMAS C. JORLING
COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

BEFORE THE COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE

JULY 21, 1989

MR. CHAIRMAN, I AM PLEASED TO COME BEFORE YOU TO TESTIFY ON PENDING OIL SPILL LEGISLATION AND, NECESSARILY, ON THE RELATIONSHIP OF DOMESTIC OIL SPILL LEGISLATION TO THE INTERNATIONAL REGIME THAT HAS BEEN ESTABLISHED OVER THE YEARS.

MR. CHAIRMAN, BEGINNING IN 1968 DURING SERVICE TO THIS COMMITTEE AS MINORITY COUNSEL, I HAVE BEEN BOTH PARTICIPANT IN AND OBSERVER OF THE CONTINUING STRUGGLE TO ESTABLISH A REGIME OF RESPONSE TO OIL AND, NOW, CHEMICAL SPILLS, BY DEVELOPING RESOURCES NECESSARY TO MAKE THAT RESPONSE MEANINGFUL, AND BY IMPOSING REGIMES OF LIABILITY ON THE PARTIES WHO ARE ENGAGED IN THE MARKETING OF THESE MATERIALS. FOR MOST OF THE PERIOD, THE UNITED STATES HAS BEEN A LEADER IN THIS EFFORT, WITH MANY STATES, INCLUDING MY OWN, ESTABLISHING THEIR OWN PROGRAMS. A COMPREHENSIVE AND ADEQUATE OIL SPILL CONTROL PROGRAM, WHETHER STATE, FEDERAL OR INTERNATIONAL, MUST ACHIEVE TWO SIMPLE BUT EXTREMELY IMPORTANT OBJECTIVES.

THE FIRST OBJECTIVE IS TO PUT IN PLACE A BODY OF AUTHORITY AND RESOURCES THAT ASSURE IMMEDIATE AND ADEQUATE RESPONSE IN ANY AND ALL CIRCUMSTANCES IN WHICH AN OIL SPILL MIGHT OCCUR. TO SATISFY THIS OBJECTIVE, WE HAVE ESTABLISHED FUNDS MAKING

RESOURCES AVAILABLE AT THE FEDERAL AND STATE LEVELS TO ENABLE QUICK RESPONSE TO REMOVE AND REMEDIATE SPILLS WHEN RESPONSIBLE PARTIES DO NOT UNDERTAKE IMMEDIATE, PROPER AND ADEQUATE MEASURES. THIS AUTHORITY AND THESE PROGRAMS ARE BACKED BY FUNDS VARIOUSLY ESTABLISHED AT BOTH THE STATE AND FEDERAL LEVEL, BUT ALL SHARING THE COMMON THEME OF PROVIDING READILY AVAILABLE RESOURCES GENERATED BY FEES IMPOSED ON THE MOVEMENT ON PETROLEUM AND ITS PRODUCTS. THE FUND SIZES ARE, HOWEVER, NOT ADEQUATE. ENLARGING THEM IS ONE PRINCIPLE PURPOSE OF THE LEGISLATION PENDING BEFORE YOU.

FURTHER, WE HAVE SEEN RECENTLY, ESPECIALLY IN THE VALDEZ CASE, THAT THERE ARE OTHER IMPEDIMENTS TO THE IMMEDIATE DEPLOYMENT OF THESE RESOURCES. AS YOU REVIEW THE LEGISLATION BEFORE YOU, YOU MUST ENSURE THAT COST RECOVERY PROCEDURES ARE NOT SO RIGID THAT IF RESPONSIBLE PARTIES DO NOT APPEAR TO BE RESPONDING, OR RESPONDING QUICKLY ENOUGH OR ADEQUATELY ENOUGH, ON-SCENE COORDINATORS ARE DISCOURAGED FROM ACTING FOR FEAR THAT REIMBURSEMENT FOR COSTS INCURRED MAY NOT BE ULTIMATELY AVAILABLE. THE LAST THING THAT AN ON-SCENE COORDINATOR NEEDS IN A VERY CONFUSING AND URGENT SITUATION IS DOUBT AS TO WHETHER HIS OR HER ACTIONS TO COMMENCE SPENDING FROM A STATE OR FEDERAL FUND WILL BE COVERED BY THE LIABILITY REGIME. THE LAW MUST MAKE IT CLEAR THAT INADEQUATE CLEANUP ON THE PART OF A RESPONSIBLE PARTY WILL MEET WITH IMMEDIATE ACTION BY FEDERAL OR STATE RESPONSE AUTHORITIES.

THE SECOND OBJECTIVE AND, IN THE LONG TERM THE MAIN OBJECTIVE, OF THE OVERALL SCHEME OF OIL POLLUTION RESPONSE AND LIABILITY IS TO INDUCE A HIGH STANDARD OF CARE IN THE HANDLING, STORAGE AND TRANSPORTING OF OIL. WHILE HIGH LIABILITY LIMITS AND ACCESS TO RESPONSIBLE PARTIES ARE CRITICAL TO A COMPREHENSIVE OIL SPILL PROGRAM, THEY ARE LESS IMPORTANT THAN PREVENTING THE SPILL IN THE FIRST PLACE. THE POLICY MUST BE TO AVOID LOSS OF NATURAL RESOURCES AS THERE IS NO GUARANTEE THAT SUCH RESOURCES WILL EVER BE REPLACED. YOUR LEGISLATIVE OBJECTIVE OUGHT NOT TO BE PUNITIVE TOWARD THE TRANSPORT OF OIL BUT TO THE SPILL OF OIL. YOUR TASK IS COMPARABLE TO MY RESPONSIBILITIES AS THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION TO PURCHASE LANDS IN NEW YORK STATE'S ADIRONDACK PARK FOR PERPETUAL PRESERVATION, OR TO PUT IT ANOTHER WAY, TO PREVENT LOSS OR DAMAGE TO THESE IMPORTANT NATURAL RESOURCES. YOU, TOO, MUST HAVE AS YOUR OBJECTIVE THE MARSHALLING OF EVERY REGULATORY WEAPON AVAILABLE TO PREVENT NATURAL RESOURCE DESTRUCTION IN THE FIRST INSTANCE.

IT IS CLEAR THAT THE REGIMES THAT ARE IN PLACE ARE INSUFFICIENT IN IMPOSING THE NECESSARY LEVEL OF PREVENTION. THE INCIDENTS WE HAVE SEEN IN RHODE ISLAND AND IN ALASKA MAKE IT CLEAR THAT SHIP OWNERS AND OPERATORS, THOSE PERSONS RESPONSIBLE FOR IMPOSING STANDARDS OF CARE, STILL TAKE RISKS THAT DO NOT, BY ANY CALCULUS, FALL WITHIN THE RANGE ACCEPTABLE TO SAFELY MANAGE THIS COMMODITY. THE MOST EFFECTIVE METHOD OF INDUCING A HIGH STANDARD OF CARE IS TO ASSURE THAT THE SPILLER WILL BE HELD

LIABLE AND THAT THE STANDARDS OF LIABILITY ARE CLEAR AND ENFORCEABLE.

STRICT LIABILITY IS A MUST. DEFENSES OF CONTRIBUTORY, COMPARATIVE OR EVEN ABSENCE OF NEGLIGENCE MUST NOT BE AVAILABLE TO THOSE WHO MANAGE OIL OR CHEMICALS IN BULK. DEFENSES TO LIABILITY SHOULD NOT EXTEND ANY FURTHER THAN THOSE IN FEDERAL LAW SINCE 1970: THAT IS, ONLY WHEN THE RELEASE IS SOLELY THE RESULT OF AN ACT OF GOD, AN ACT OF WAR OR AN ACT OF A THIRD PARTY. INTENT HAS NOTHING TO DO WITH THE ACHIEVEMENT OF A HIGH STANDARD OF CARE. WE HAVE SEEN REPEATEDLY IN ENVIRONMENTAL LAW THAT RESPONSIBLE PARTIES WILL NOT TAKE THE STEPS NECESSARY TO AVOID RELEASES TO THE ENVIRONMENT ABSENT THE DISCIPLINE OF STRICT STANDARDS OF LIABILITY WHICH EXPOSE RESPONSIBLE PARTIES TO THE FULL CONSEQUENCES OF THEIR ACTIONS.

ADEQUATE LIABILITY LIMITS ARE ALSO CRITICAL TO ACHIEVING HIGH STANDARDS OF CARE. LOW LIABILITY LIMITS CAN PRODUCE A BUSINESS JUDGMENT THAT THE INSURANCE CHARACTERISTICS ARE SUFFICIENT TO COVER ANY POTENTIAL COSTS OF RELEASE. RISK BECOMES, IN SHORT, A COST OF DOING BUSINESS AND, THUS, STEPS NECESSARY FOR INDUCING A HIGH STANDARD OF CARE ARE NOT FACTORED INTO BUSINESS DECISIONS REGARDING HANDLING AND TRANSPORTATION OF OIL. LIMITS TO LIABILITY, IF THEY HAVE ANY PURPOSE AT ALL, MUST BE HIGH ENOUGH TO REFLECT THE REAL POTENTIAL FOR DAMAGE THAT CAN RESULT FROM THE RELEASE OF OIL. THEY SHOULD NOT, UNDER ANY

CIRCUMSTANCES, INDUCE THE MENTALITY THAT RISKS ARE COVERED AND, THEREFORE, BECOME A COST OF DOING BUSINESS.

MR. CHAIRMAN, OF ALL THE BILLS PENDING BEFORE CONGRESS, THE MAJORITY LEADER'S COMES THE CLOSEST TO SATISFYING THE TWO OBJECTIVES THAT I HAVE DESCRIBED. THE MITCHELL BILL PROVIDES THE FINANCIAL AND REGULATORY UNDERPINNINGS OF A QUICK RESPONSE PROGRAM, AND IT SETS FORTH THE STRICT LIABILITY STANDARD NECESSARY TO CREATE A PREVENTION MENTALITY BY THOSE WHO TRAFFIC IN OIL PRODUCTS. HOWEVER, THE BILL SHOULD BE AMENDED TO INCREASE THE LIABILITY LIMITS TO THE LEVEL NECESSARY TO PROVIDE DETERRENCE.

MR. CHAIRMAN, I THINK IT'S IMPORTANT TO REFLECT FOR A MOMENT ON THE OVERALL CHARACTER OF THE OIL POLLUTION CONTROL PROGRAM THAT EXISTS AT THE STATE, FEDERAL AND INTERNATIONAL LEVELS. IT HAS BEEN CALLED A "PATCHWORK QUILT" AND THAT IS CERTAINLY AN ACCURATE DEFINITION, BUT IT IS A "PATCHWORK QUILT" THAT IS EVOLVING TO PRODUCE A HIGH STANDARD OF CARE IN THE MANAGEMENT OF OIL. THE COASTAL STATES, LIKE NEW YORK, MUST HAVE THE ABILITY UNDER FEDERAL LAW TO CRAFT THEIR OWN PROGRAMS TO MEET THEIR OWN NEEDS, WITHOUT FEAR OF PREEMPTION. THERE IS NO JUSTIFICATION FOR PREEMPTION IN THIS FIELD OR IN ANY OTHER FIELD OF ENVIRONMENTAL OR HEALTH PROTECTION. THE CITIZENS OF ANY STATE MUST BE FREE TO MOVE BEYOND FEDERAL MINIMUMS IN ORDER TO PROTECT THE HEALTH AND WELFARE OF THEIR PEOPLE, AND OF THEIR ENVIRONMENT, AS THEY SEE THOSE NEEDS ARISE. THUS, ANY OF THE PROPOSALS WHICH WOULD

PREEMPT THE STATE LAW ARE OBJECTIONABLE. OUR PROGRAM IN NEW YORK IS CRUCIAL TO THE OVERALL SUCCESS IN ACHIEVING PREVENTION OF OIL SPILLS, NOT JUST IN COASTAL WATERS, BUT IN INLAND WATERS AND ON OUR LANDSCAPE AS WELL. THE COSTS OF THIS PROGRAM CAN BE VERY WELL BORNE BY THE COMMERCE OF OIL IN NEW YORK.

SECONDLY, THE FEDERAL GOVERNMENT SHOULD NOT ESTABLISH ARTIFICIALLY LOW LIMITS OF LIABILITY. THE MESSAGE OF RECENT INCIDENTS ONLY CONFIRM THAT OF PAST INSTANCES OF OIL SPILLS: THE COST OF OIL SPILLS, ESPECIALLY THE FULL COST OF CLEANUP AND RESTORATION, ARE VERY HIGH AND, UNLESS THE LIMITS OF LIABILITY REFLECT THAT FACT, THE "COST OF DOING BUSINESS MENTALITY" WILL PREVAIL AMONG THOSE RESPONSIBLE FOR MANAGING OIL. SPILLS CAUSED BY RISK-TAKING WILL CONTINUE TO OCCUR. THE "PATCHWORK QUILT" HAS BEEN WORKING IN THE UNITED STATES TO PROVIDE A MEASURE OF PREVENTION. IT NEEDS TO BE IMPROVED AND, ASSUMING INCREASE OF LIABILITY LIMITS, THAT IMPROVEMENT WOULD BE PROVIDED BY THE MAJORITY LEADER'S BILL.

BUT WE CANNOT IGNORE THE RELATIONSHIP OF U.S. LAW TO INTERNATIONAL LAW. AS I HAVE WITNESSED THE EVOLUTION OF OIL SPILL PROGRAMS, I AM CONTINUALLY IMPRESSED BY THE NUMBER OF OPPORTUNITIES INDUSTRY HAS TAKEN TO MOLD PUBLIC POLICY IN THE IMAGE OF ITS VIEWS. IN 1970, INDUSTRY STRUGGLED MIGHTILY TO PREVENT STATUTORY ENACTMENT OF THE STANDARD OF STRICT LIABILITY, AND FOUGHT HARD TO ESTABLISH LOW LIMITS OF LIABILITY. IN THE CONTEXT OF THAT PERIOD, THEY WERE UNSUCCESSFUL. THEY ENGAGED IN

THE SAME KIND OF LOBBYING TO PREVENT ESTABLISHMENT OF STATE PROGRAMS TO PREVENT AND PROTECT FROM OIL SPILLS. INDUSTRY CONTINUES TO LOBBY AND I DO NOT BEGRUDGE THAT ACTIVITY. I RESPECT ANY INTEREST THAT UNDERTAKES TO REPRESENT ITSELF AND MINIMIZE ADVERSE IMPACTS UPON IT IN THE FORMULATION OF PUBLIC POLICIES. BUT IN THIS CASE, WE CANNOT CONFUSE THAT EFFORT WITH THE PUBLIC INTEREST.

IT IS IN THE INTERNATIONAL ARENA WHERE THE INDUSTRY'S EFFORTS AND PRESSURE TACTICS HAVE BEEN APPLIED TO THE GREATEST EFFECT. REPRESENTATIVES OF INDUSTRY OFTEN SERVE ON THE DELEGATIONS WHICH NEGOTIATE INTERNATIONAL AGREEMENTS, EVEN ON BEHALF OF THE UNITED STATES. BECAUSE OF THEIR ECONOMIC POWER, INDUSTRY OFTEN DICTATES THE NATIONAL POSITION OF MANY FOREIGN GOVERNMENTS. AS A CONSEQUENCE, THE PROVISIONS OF INTERNATIONAL LAW ARE OFTEN THE LOWEST COMMON DENOMINATOR, BENEFITTING THE INDUSTRY THEY ARE DESIGNED TO REGULATE. THE SUPREMACY CLAUSE OF THE CONSTITUTION MAKES THIS AN ESPECIALLY TROUBLESOME PATTERN. WHAT WE NOW HAVE IN THE INTERNATIONAL ARENA IS AN OIL POLLUTION REGIME WHICH IS INADEQUATE WITH RESPECT TO BOTH STANDARDS OF LIABILITY AND LIMITS OF LIABILITY. THE SO-CALLED PROTOCOLS WHICH HAVE BECOME SO IMPORTANT TO THIS YEAR'S DEBATE ON U.S. LEGISLATION ARE DEFICIENT AS A MATTER OF PUBLIC POLICY. THEY ARE DEFICIENT BECAUSE THEY WERE CRAFTED WITH THE FINE HAND AND THE ACTIVE PARTICIPATION OF THE INDUSTRY THEY ARE INTENDED TO REGULATE. THE UNITED STATES MUST TAKE THE POSITION THAT, WITH REGARD TO THE BASIC MINIMALLY ACCEPTABLE STANDARDS OF LIABILITY

FOR OIL POLLUTION, THE CURRENT CONVENTIONS AND PROTOCOL ARE INADEQUATE. THIS CAN ONLY BE DONE IF THE UNITED STATES CONTINUES TO REJECT THOSE PROVISIONS, AS IT HAS DONE OVER THE LAST SEVERAL YEARS, FIRST BY NOT RATIFYING THE PROTOCOLS AND NOW BY REJECTING THEM.

MR. CHAIRMAN, IF THE UNITED STATES TAKES THAT POSITION, WHICH YOU WOULD DO BY ADOPTING THE MAJORITY LEADER'S BILL AND BY NOT EXEMPTING OR PREEMPTING NATIONAL OR STATE LAW ON BEHALF OF THESE INTERNATIONAL AGREEMENTS, THE INTERNATIONAL COMMUNITY WILL RESPOND AND PRODUCE AN ACCEPTABLE REGIME. THIS IS A TIME FOR FIRMNESS AND THIS IS A TIME FOR LEADERSHIP AND, MR. CHAIRMAN, THIS COMMITTEE, THE SENATE AND THE UNITED STATES CONGRESS ARE IN A POSITION TO PROVIDE THAT LEADERSHIP.

SO LET ME RESTATE THE POSITION. WITH THE EXCEPTION OF ITS LIABILITY LIMITS, THE STATE OF NEW YORK SUPPORTS THE MAJORITY LEADER'S BILL ON OIL POLLUTION. WE OPPOSE ANY MEASURE WHICH WOULD IN ANY WAY PREEMPT STATE LAW AND PROGRAMS AND WE OPPOSE DEFERENCE TO ANY INTERNATIONAL AGREEMENT OR PROTOCOL WHICH ACCEPTS A STANDARD OF LIABILITY WHICH IS INADEQUATE TO PRODUCE THE HIGH STANDARD OF CARE WHICH IS ABSOLUTELY ESSENTIAL IF WE ARE TO REDUCE THE SCOURGE OF OIL SPILLS IN OUR ENVIRONMENT.

Testimony

of

Kenneth R. Dickerson
Senior Vice President, Government Affairs
ARCO

before the

Subcommittee on Environmental Protection
of the
Environment and Public Works Committee

United States Senate

July 21, 1989

Mr. Chairman, my name is Kenneth R. Dickerson. I am Senior Vice President, Government Affairs, for ARCO, a major U.S. based producer and marketer of petroleum and petroleum products, natural gas, coal and petrochemicals. We are also a major transporter of petroleum by water and pipeline in the Texas-Oklahoma-Kansas region of the U.S., but primarily in the West Coast region known as PADD V, through our 21 percent ownership in the Trans-Alaskan Pipeline System, and our 10 vessel marine fleet and related facilities. We have major refining, docking, storage and terminaling facilities in Cherry Point, Washington, and Los Angeles-Long Beach, California. Through our partial ownership of Lyondell Petrochemical and direct ownership of other assets, we also have similar facilities on the Texas gulf coast.

It is a pleasure to appear before your committee today to discuss ARCO's views on comprehensive oil spill removal legislation.

Let me say for the record, Mr. Chairman, that we are deeply saddened by the losses to wildlife and to the Alaskan environment that have resulted from the tragic Prince William Sound oil spill. As you know, for some time now ARCO has supported oil spill legislation that would create a single, comprehensive Federal fund to deal with this issue. I am convinced that had we had such a system in place with proper, clear lines of oil removal authority and responsibility, and with pre-planned and approved tactics for removing oil, oil spill containment and clean-up would have been

accomplished much more effectively.

We have continued to give this issue a good deal of thought within our company, Mr. Chairman. And the key point we keep coming back to is "clear lines of oil removal authority and responsibility." We recognize that many states, private cooperatives, and oil transportation companies themselves are capable or certainly could be made capable of expeditiously cleaning up major oil spills. However, government jurisdictional responsibility overlaps, and this can and does delay critical decisions and consumes valuable time, while a spill continues to spread over a wider and even less manageable area.

In addition, having multiple layers of spill removal responsibility, each with its own required equipment, staff, maintenance and funding, is not the most effective way to clean up a spill. Moreover, as budgetary pressures impinge on each of the several different responsible organizations, each could believe and assume that other organizations would handle the bulk of the problem or would have the equipment necessary to supplement that which was immediately available. Reliance upon others, without direct involvement and full knowledge of their capabilities, could present the classic "fool's paradise." It could even lead a spiller or clean-up group to reduce or minimize its own commitment. And that, as you well realize, would create the worst possible situation.

These considerations have lead ARCO to strongly believe

that the Federal government, acting through the Secretary of Transportation, must be given the sole and exclusive responsibility for cleaning up any oil spills into or upon the waters of the United States. This would include discharges from ships, on-shore and off-shore platforms, and related facilities, in navigable U. S. rivers and lakes, as well as U.S. territorial waters. This approach is similar to current law, except that current authority is permissive rather than mandatory, and funding does not now exist for Department of Transportation spill clean-up preparation and response. Under the ARCO proposal the Secretary should also have the authority to delegate clean up responsibility to the spiller in cases where the spill is less than 1000 barrels and where the Secretary believes that the spiller is capable of performing the task adequately and in an expeditious manner.

ARCO's proposal would provide a single point of responsibility for oil spill removal, with clear lines of authority and an emergency military style of command and control. And a centrally based, coordinated series of actions plans, equipment, required personnel, and maintenance would be established. This should not preclude utilization of state, local or private equipment, supplies or manpower by the Secretary or the Coast Guard. Rather, inventories of these items could and should be considered by the Secretary in developing the comprehensive, integrated spill removal action plan. However, the Secretary should be authorized to

fully equip his department to respond to and clean-up any foreseeable oil spill in the U. S.

We believe that this objective could be most easily accomplished by amending Section 311 of the Federal Water Pollution Control Act (FWPCA) and the National Contingency Plan, over which your Subcommittee has jurisdiction.

Our greatest concern is that oil spills be cost effectively cleaned up as quickly as possible, before potentially more serious environmental harm can occur. And while we believe that the U.S. government should be responsible for the actual spill removal, the costs of that removal should be paid for by the spiller. That is, the spiller should be required to reimburse the Federal Government for all spill removal costs. For pre-spill preparation costs, such as planning, purchase of equipment, and training, and for oil removal costs which cannot be collected from the spiller, we believe that a Federal fund should be utilized to pay these costs.

As you know, Mr. Chairman, Sections 4611 and 9509 of the Internal Revenue Code of 1986 contain language that establish an Oil Spill Liability Trust Fund, with the authority to collect a tax of 1.3 cents per barrel of crude oil received at U.S. refineries and imported petroleum products, until a \$500 million limit is reached. Such a fund could provide the necessary Federal funding for the oil spill clean up approach I have outlined.

As I mentioned at the outset, Mr. Chairman, ARCO has

supported the creation of a single Federal oil spill fund for some time--probably most of the last twelve years that this has been an issue. We also support merging the Federal funds created by the OCS Act and Deepwater Ports Act, and the Federally chartered fund created by the TAPS Act into a single Federal fund. The fees currently or previously collected by these funds would cease to be collected. In addition, because these funds were funded through per barrel assessments rather than general appropriations, we would support past payers of these monies receiving a credit against new tax or fee obligations of the new Federal fund, after the liabilities of existing funds have been settled. Also, in the case of the TAPS Fund, we would support Alaska receiving a payment in lieu of a credit against its tax or fee obligations for the new fund, should Alaska so desire.

We also support the burden-sharing of funding along the lines of the existing Internal Revenue Service Code--a per barrel tax or fee applied to all crude oil barrels received at U.S. refineries and all barrels of imported petroleum products. We support a cents per barrel tax with a fund level of \$500 million for both liability and spill removal, though we would be willing to support somewhat higher levels if it were demonstrated that higher levels were necessary to adequately handle clean up preparation, spill removal and liability. However, we would hope that our suggested spill removal approach would facilitate clean-up, reducing its

cost, thereby reducing liability claims and reducing the size of the necessary fund. We would also support, as necessary, a somewhat higher temporary tax level to more rapidly establish or replenish the fund to the target level. Beyond the roll-over of existing funds into a new Federal fund, we additionally support rolling over the existing liability language of these funds as well.

Let me address the issue of "state pre-emption." When we speak of oil spill removal, part of the reason for mandating Federal responsibility is to remove the clean up burden and all of its related costs from the shoulders of state governments. Since our proposal contemplates exclusive Federal control over oil spill clean-up activities in the U.S. and Department of Transportation ownership of all equipment necessary to clean up spills, there should be no need for state funds to duplicate Department of Transportation efforts. On the other hand, there could and should be state involvement in pre-planning for spill clean-up and resource rehabilitation as exists now in the National Contingency Plan, and we would recommend that the legislation include provision for the state to be compensated by the Department of Transportation fund for its involvement in pre-planning and consultation with the Secretary.

Liability is an issue that we have not addressed in our proposal. There are many bills pending before the Congress which address this issue and we are certain that adequate provision will be made by the Congress for parties damaged as

a result of a spill. We have chosen to focus on spill preparation and clean-up and believe that our recommendations can be merged by this Congress with existing liability proposals to provide a complete and compatible package.

That concludes my prepared remarks, Mr. Chairman. I would be pleased to answer any questions that you and your Subcommittee members might have.

STATEMENT
ON
OIL POLLUTION LIABILITY, CLEANUP
AND COMPENSATION LEGISLATION

presented by

JOSEPH FARRELL
PRESIDENT
THE AMERICAN WATERWAYS OPERATORS (AWO)

before the

SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

July 21, 1989

Mr. Chairman and Members of the Subcommittee:

My name is Joseph Farrell, President of the American Waterways Operators (AWO), the national trade association of the inland, coastal and ocean-going tug and barge industry. I am accompanied by Dena L. Wilson, AWO Vice President of Legislative Affairs. AWO appreciates the opportunity to appear before you in support of comprehensive oil spill liability, cleanup, and compensation legislation.

Before embarking on the substance of our statement regarding the various legislative proposals, I'd like to provide the subcommittee with some general information about our industry. AWO members serve 41 states on our inland waterways, the Atlantic, Gulf, and Pacific coasts and provide service to Alaska, Hawaii, and the Caribbean. Petroleum and petroleum products account for about 40 percent of the commodities moved by our industry. These cargoes are carried in tank barges which must meet stringent U.S. Coast Guard design and construction standards and are subject to thorough periodic inspections by the Coast Guard. The personnel who operate the tugboats and the crews which handle cargo transfers are subject to a comprehensive training, licensing and certification regime also administered by the Coast Guard. The industry places enormous emphasis on education and training to assure the proper handling of petroleum at all times -- shoreside and in transit.

- 2 -

Mr. Chairman, you and your colleagues have spent many hours listening to testimony in the wake of the Valdez spill and the three more recent spills in Narragansett Bay, Delaware Bay and the Houston Ship Channel. These spills have stunned the maritime industry, and we deeply sympathize with those whose lives have been disrupted by the spill. All of our shared concern generated by this tragedy must be focused on learning what caused the accident, taking measures to prevent the recurrence of such an accident, improving the technology and the capability to contain spills if they occur, and streamlining and improving current laws and regulations pertaining to oil pollution liability and compensation to ensure fair and effective claims resolution. I must say this whole effort, one which we all share, will be hindered in its success if it is allowed to be contaminated by emotion and if the true facts are not assiduously sought. These spills, especially in Prince William Sound, were horrendous events which damaged property, killed wildlife and dislocated people, never mind tarnishing the image of this proud industry. We, all of us together, must dedicate ourselves to finding effective and responsible ways to reduce to the lowest level we can the likelihood this will happen again. That means adjuring theatrics.

I wish to state today, as clearly as I can, that the oil transportation industry, of which AWO members play a major role, is not indifferent about safety or protection of the environment. Apparently, some would represent to the public that we travel up and down the rivers and coasts of the United States blind to the treasures conferred on this nation in its waterways, shorelines, wildlife and other natural resources. That is

- 3 -

nonsense as any thinking person knows. I don't know anyone in this industry who does not care about preserving this heritage, as citizens and as parents. As a second-level consideration, the industry must vigorously compete among itself for business, as well as with other modes. This competition requires the shipper to take into consideration not only the rate charged for the service provided but also the safety record of the transporter. If a carrier has an unsafe record, the shipper will select another operator. If the safety record of the industry as a whole is poor, shippers will choose to instead shift to other modes.

Since 1975, AWO has supported comprehensive federal legislation which:

- Establishes a single strict liability regime for shipowners, facility owners, and cargo owners, backed by a single fund;
- Supersedes other similar federal laws and preempts state oil spill liability laws;
- Provides compensation for clean-up costs, demonstrable economic losses suffered by property owners and businesses as a direct result of a spill, and the actual cost of restoring, replacing, or rehabilitating natural resources;
- Sets reasonable limits of liability so that the vessel owner is liable in the first instance, with the balance of the liability borne by the cargo interests through a fund financed by a fee on oil shipments;

- Requires mandatory insurance or other forms of financial responsibility to cover the liability established in the legislation; and
- Establishes a streamlined claims settlement procedure that enables claimants to avoid delay and litigation by proceeding directly against the shipowner and/or the federal fund.

The current federal oil spill compensation and liability system is cumbersome. Vessel operators and claimants must operate under several federal and state laws, which may or may not apply depending upon where they are operating and what type of cargo they are handling. At the federal level, the shipowner is subject to strict liability for cleanup under the Clean Water Act. Under certain circumstances, shipowners may also be subject to strict liability for cleanup and third party damages under the Trans-Alaska Pipeline Authorization Act, the Deepwater Ports Act, and the Outer Continental Shelf Lands Act Amendments. These statutes establish duplicative multi-million dollar back up funds.

The problems with overlapping and duplicative response funds are evident. In the Alaskan spill confusion about applicability of the cleanup fund contained in the Clean Water Act as opposed to the Trans-Alaska Pipeline Authorization Act fund would have been avoided by having a single, all-purpose fund. One clear lesson so far from the recent spills is the need for a single, comprehensive oil spill liability and compensation regime backed by an adequate federal fund which replaces existing funds.

Senator Mitchell's bill, S. 686, among other things, accomplishes the goal of consolidating existing federal funds; H.R. 1465, as approved by the House Merchant Marine and Fisheries Committee, incorporates the principles AWO believes are necessary in comprehensive legislation and defines the role of federal and state regimes by incorporating elements of federal preemption.

Preemption of state law is essential, we believe, to the objectives of a comprehensive oil spill regime. Over twenty states have oil spill liability laws. Most impose strict liability on shipowners and facility owners and generally recognize the same types of recoveries for cleanup and removal actions but without the same breadth, specificity and clarity of S. 686 and the House measure.

The failure to preempt completely state law has the effect of removing the limits of liability for the shipowner. Since most states do not recognize limitation in their laws, state claims therefore would "wrap around" or exceed the limits for claims brought under the proposed federal laws. This undermines the fundamental purpose of S. 686, S. 1066 and the House bill ... the concept of shared liability between the shipowner and the cargo owner. That sharing is critical, we believe, to the goals we seek together. No shipper will choose a transporter with questionable crew training requirements or safety records if that shipper has a financial stake in the transport of his cargo to its destination.

- 6 -

Allow me to emphasize that limitation for the shipowner is not a limit on claims. Limitation establishes the point at which the payment of claims shifts from the vessel owner to the federal fund financed by the cargo owner. Limitation is the device which allows the risk to be allocated between the shipowner and the cargo owner. Limitation facilitates the procurement of insurance at reasonable rates for shipowners, and it provides the cargo interests with a direct stake in the transportation of cargo and a strong incentive to use those transporters who maintain high standards of performance.

AWO is well aware of this Committee's opposition to federal preemption. However, Mr. Chairman, it appears to us that the system of compensation and the scope of damages enumerated in S. 686 and in H.R. 1465 is as comprehensive or in most cases, far superior to any of the state oil pollution laws. Accordingly, we believe these measures are so broad and complete that the states will not be giving up provisions which are more beneficial. Moreover, claimants will be reimbursed expeditiously under a preemptive system.

I'd like to briefly address the Administration's position on preemption, a departure from the strong support expressed by past Administrations. Senator Chafee has introduced by request the President's proposal, S. 1066. The only preemption now supported by the Administration is that necessary to implement two international oil spill protocols with more restrictive coverage than is applicable to all spills in U.S. navigable waters under S. 686 or H.R. 1465. The Administration would retain the

- 7 -

current patchwork system and add to that patchwork additional layers of inconsistent federal and international law. In AWO's view, adoption of this preemption "hybrid" would surely compound the bewilderment of determining where one legal system picks up and others leave off.

The limits of liability under S. 686 do not distinguish between tankers and tank barges under 3000 gross tons operating in specifically - referenced areas, as does S. 1066 and the House measure, H.R. 1465. We fail to understand the justification for a ten million dollar liability limit for these vessels. I am unaware of cleanup and damage costs from a spill from this type of vessel approaching anywhere near this limit. The limits in the afore-mentioned bills are reasonable and affordable and justifiable, in our view, by record accrued since 1971. In essence, barge operators will not be afforded the opportunity to limit liability and again, one of the primary purposes of a comprehensive bill -- shared liability -- will be abandoned.

Transportation of freight, by whatever mode, has inherent risks. We emphasize that the barge and towing industry performs a critically important service for the American consumer. Our member companies deliver home heating oil, jet fuel, gasoline and crude oil ... products that are inherent to American life. Anger over the Valdez and other spills, should animate us to much better protection and not unwittingly loosen the furies so that restraint is sacrificed by imposing penalties which are

- 8 -

so onerous that they act not as a deterrent to negligent carriage of petroleum, but instead destroy an industry which is so beneficial to American consumers.

AWO is strongly supportive of the need to federalize oil spill response in the event of a major spill. The problems associated with the Alaska situation have been well documented; however, the ambiguity surrounding the decision-making process in the absence of clear authority significantly delayed private sector response to the recent Delaware Bay spill as well. This, it appears, is not an isolated occurrence.

We unequivocally favor legislation which makes unmistakably clear that response to and management of spills is the responsibility of the federal government through the U.S. Coast Guard. From the first moment, someone must be in charge of the cleanup and everyone must know who that is. The language in S. 686 goes a long way in this direction, but still not far enough, we believe. There are two corollaries to this. Some form of relief should be available to the spiller if the Coast Guard is deficient in its response. The spiller should not be liable for damages which were clearly preventable. And, we believe it is mandatory to assure adequate readiness that the Coast Guard be required to conduct periodic drills to assess the ability of all who need to be involved to respond effectively.

- 9 -

Mr. Chairman, the tug and barge industry pledges its assistance to you and your staff in the development of oil spill legislation. While there are significant differences in opinion, there are identical common objectives ... chief among them, the desire to develop a comprehensive bill which will assess responsibility, improve cleanup and compensate victims. We are available to answer any questions you and your colleagues have.

TESTIMONY OF THOMAS JAMES
GENERAL COUNSEL, LOOP INC.
BEFORE
SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U. S. SENATE
JULY 21, 1989

Mr. Chairman and members of the subcommittee. My name is Tom James. I am the General Counsel of LOOP INC. LOOP owns and operates the Louisiana Offshore Oil Port, the only deepwater port licensed by the U. S. Department of Transportation pursuant to the Deepwater Port Act. This committee was a major participant in developing and enacting that law in 1974 to enable the construction and operation of Deepwater Ports.

LOOP's Deepwater Port is a large crude oil reception facility located 18 miles offshore of Louisiana in the Gulf of Mexico. We receive oil from large tankers at the port and pump the oil through a 48-inch pipeline to onshore storage facilities. We are currently handling about 800,000 barrels per day of crude oil. Our port was designed and constructed to accommodate the very large or ultra large tankers, ships that are too large to call at United States inland ports.

It was recognized prior to 1974, when the Deepwater Port Act was enacted, that the United States was going to need increasing amounts of imported crude oil. It was also recognized that, if deepwater ports were not available to serve the large tankers, this oil would be landed in inland ports by increasing numbers of small ships at greater risk of oil spills.

LOOP was built in major part to prevent and minimize the effect of spills associated with crude oil transportation. The law, which this committee helped to craft, contains many detailed requirements directed towards assuring that the objective of preventing and minimizing spills would be achieved.

In looking back over our eight years of operation, we have been very successful in minimizing the number of spills and quantity of oil released into the environment. To date, of the 1.5 billion barrels of crude oil we have transported, only 800 barrels have been spilled offshore.

Despite this past good record, we continue to modify our procedures as needed based on spill experiences and training drills. We place considerable emphasis on training. Drills are conducted throughout the year. We recently conducted a full scale annual drill with our complete response team. We had 21 participants from the various local, state and federal agencies participate in the drill. Not only are these annual drills excellent training exercises, but they also have served to build a good working relationship with the agencies which would be involved in a real spill response.

LOOP has succeeded in minimizing oil spills associated with marine transportation and believe we have been an environmental success as Congress anticipated.

Some of the basic concepts of our port operate automatically to reduce the likelihood and impact of a spill. We are located 18 miles offshore in 110 to 115 feet of water in the Gulf of

Mexico. This location eliminates the threat of groundings and eliminates the threat of narrow channels. Also, being offshore increases the chances that, if a spill does occur, it can be dealt with before coming ashore.

Other protective design features are built into the port. The LOOP Safety Zone encompasses approximately 36 square miles. The primary purpose of this Safety Zone is to define an area in which any activity that may directly or indirectly increase the environmental and safety risks associated with the port operation may be minimized or prohibited.

We maintain a continuous surveillance of the area. A 24-hour-per-day communications and radar watch is maintained on the LOOP offshore platform. LOOP's vessel traffic controller could be compared to an air traffic controller at an airport. We have authority over the entire Safety Zone and restrict access and vessel movement to avoid potential problems. The oil is transported by pipeline from the tanker to our shore storage facility located 44 miles inland. Our onshore Operations Center communicates routinely with the tanker and the LOOP offshore platform via our microwave and radio communication system.

LOOP's vessel traffic controllers, mooring masters and cargo transfer supervisors are required to meet rigorous qualifications and standards that are enumerated in the Deepwater Port U. S. Coast Guard regulations. We feel very good about the quality of our overall work force, but continue to emphasize training and safety in all phases of our operations.

Our Drug and Alcohol Policy policy prohibits the possession or use of unauthorized drugs and alcohol on company premises. Reporting to work under the influence of drugs or alcohol is prohibited.

In enforcing the policy, unannounced searches are made of employees, contractors and personal property. These searches are conducted as a deterrent or if there is evidence of a policy violation. Laboratory testing is used as needed to detect or confirm policy violations. On pre-employment, laboratory drug testing is included with the physical exam and a Motor Vehicle Record check is made. We are currently amending our policy to include random drug testing, annual physical exams for certain positions and periodic Motor Vehicle Record checks.

In summary, the design features of our port, our procedures and qualification requirements, and our policies all work toward preventing spills at our port.

While we have not had a major spill, we have responded on several occasions to small spills. On each occasion, the response plan was effective in mitigating the impact of the spill. In making these responses, it was apparent, however, that today's available mechanical clean-up equipment is not as effective as we would like it to be. LOOP has considerable oil spill response equipment which represents the best available technology and certainly the best capability available in the Gulf of Mexico or maybe anywhere in the country. We are, however, experiencing some difficulties in working with federal

agencies to put in place the capability to deal with major spills by non-mechanical means such as dispersants. We are confident that spills at deepwater ports are not only less likely to occur but also more amenable to response actions than the spills closer to shore that are likely to occur in connection with alternative transportation modes which ultimately involve vessel landings at onshore ports.

In summary, we are confident that, from an environmental perspective, Deepwater Ports, in general, and LOOP's Deepwater Port, in particular, are significantly superior means of bringing imported crude oil into this country.

Unfortunately, we are not nearly as confident under the existing legal regime and proposals such as S.686, that Deepwater Ports are competitive with alternative crude oil transportation modes either to potential port users or future investors.

There is a very evident reason why LOOP is the only offshore deepwater port in the country. The fact is that LOOP, despite the environmental benefits it offers, has not, to date, been able to provide sufficient economic benefits to make it a profitable operation. LOOP has been losing money and none of us should expect that the altruistic goal of protecting the environment will induce anyone to build another deepwater port, or even to expand LOOP's operations until the time comes that deepwater ports are demonstrated to be economically profitable enterprises.

Since we believe that deepwater ports are an environmental benefit to the nation, we must also believe that the nation's

interests will be served by providing an economic climate which is conducive to the construction and operation of deepwater ports.

There is a considerable amount that can be done now to assure that spill prevention and response legislation, such as the various bills pending before this committee, avoid disincentives, and provide positive encouragement to the availability and use of deepwater ports.

For example, the following points should be considered in your deliberations on S.686.

Since Congress, the Department of Transportation and LOOP, working together, have created a facility that minimizes oil spill risks associated with crude oil transportation and maximizes the ability to respond to spills if they do occur, the safety attributes of deepwater ports should be kept in mind when considering legislation that could affect the economics of using deepwater ports. When the committee considers legislation like S.686, which will impact the economics of transportation of oil by tankers and by LOOP, you need to consider whether the legislation will provide incentives or disincentives towards the use of an environmentally preferable transportation method, like deepwater ports. Unfortunately, our experience is that well intentioned environmental legislation has in the past imposed greater obligations on transportation through Deepwater Ports than on alternative transportation methods and has therefore provided disincentives to the use of LOOP. The points we want

to make today are (1) the lack of incentives in the legislation to encourage the use of deepwater ports; (2) the inappropriate differences between the levels of liability and financial responsibility requirements applicable under the Act; and (3) our serious concern over the legislation's failure to exercise jurisdiction to enforce liability and financial responsibility requirements against operations occurring within the exclusive economic zone but outside U.S. territorial waters.

From the time we commenced operation until late 1984, LOOP was required to contribute to a federal liability fund based on the volume of oil it received. Although we know that the risk of crude oil transportation through LOOP is much less than that associated with transportation through onshore ports, Congress actually imposed a 2 cents per barrel additional charge on shippers who selected the environmentally superior transportation method. This discrimination was ended in 1984 when Congress capped the Deepwater Port Liability Fund and suspended collections.

S.686, which establishes an oil spill compensation fund, transfers the amounts remaining in the Deepwater Port Liability Fund into the fund established by the new Act and would reinstitute collection of fees to finance the new liability fund based on oil transported through LOOP along with all other oil refined in or transported into the United States. Under existing provisions of the Internal Revenue Code, persons who have contributed to the Deepwater Port liability fund will be given

credit in the new fund for the full amount paid into the Deepwater Port fund together with the appreciation on that amount. This provision is fair and appropriate and should be retained.

We are, however, concerned that putting deepwater ports into the same fund pool with other less environmentally safe forms of crude oil transportation is inappropriate. We have spent a significant amount of money complying with the Congressional mandate to make LOOP an environmentally preferable transportation facility. In determining deepwater ports required contribution to the fund, consideration should be given to the fact that there is minimal risk that a claim will be made against the fund because of a spill at LOOP or any future deepwater port. We support one common liability fund but suggest that recognition of deepwater ports as the preferred way to transport crude oil should be given by eliminating the fee on oil shipped through deepwater ports and reducing the financial responsibility requirement for tankers calling at LOOP. This would be the most significant way to recognize the relative risks associated with different methods of oil transportation.

We welcome the provision of S.686 that eliminates the gap under existing law, where a vessel which lighters oil outside the deepwater port has a liability limit of \$250,000, and a vessel which elects to use the deepwater port, a facility which is superior both in terms of spill risk and ability to respond if a spill does occur, has a liability limit of \$20 million. However

provision should be made for establishing a lower liability limit for tankers using the more environmentally protective deepwater port transportation system. The bill provides a way of lowering the liability limits for deepwater ports by permitting the Secretary to reduce the liability limits for deepwater ports. We strongly support retention of this provision, and suggest that the Secretary be given authority to also lower the liability limits for tankers using deepwater ports. Existing law concerning liability limits sends the wrong environmental message by imposing competitive disadvantages against LOOP and tankers using LOOP and favors the conventional tanker and offshore lightering operations. S.686 provides some hope for rectifying this problem.

The last area we want to address today is the failure of the legislation to exercise jurisdiction to enforce financial responsibility and liability requirements against vessels operating in the Exclusive Economic Zone which do not call at a Deepwater Port or enter U.S. territorial waters.

We are seriously concerned that the bill's financial responsibility requirements and the provisions for enforcement of liability which the bill creates are applicable only to vessels calling at U. S. ports, vessels calling at deepwater ports and vessels in territorial waters. The bill's liability and financial responsibility provisions should be amended to ensure their enforceability against tankers which lighter or offload their cargo without entering territorial waters or calling at

deepwater ports or U.S. ports. These vessels are within the U.S. exclusive economic zone and are engaged in economic activities (namely unloading cargo) that are not incident to navigation, and therefore, these vessels are subject to control under international law by the coastal state.

For example, a 300,000 dwt tanker has the option of either calling at LOOP or lightering outside the territorial limits to small tankers for transshipment to onshore ports. If the tanker elects to call at LOOP, it will be required to demonstrate financial responsibility in the amount of \$150 million. If the same tanker elects to lighten its oil onto another smaller tanker, the Senate bill makes that vessel liable in case of a spill within the 200 mile Exclusive Economic Zone, but S.686 provides no method for enforcement and does not require any demonstration of financial responsibility. An amendment to Section 104 could correct this problem.

The small tankers lightering the oil and taking the oil to shore would, particularly if under common ownership, be subject to much lower financial responsibility requirements than either tankers calling at deepwater ports, or deepwater ports themselves. The lack of enforcement provisions and requirements for financial responsibility demonstrations for tankers operating outside the territorial waters acts as a deterrent to deepwater port use, by permitting offshore lightering operations to avoid the real costs attendant to oil spill liability and financial responsibility. This disincentive to use the deepwater port to transport crude oil should be corrected.

Our closing thought is simple. As the Committee develops a response and liability regime to provide adequate compensation mechanisms, it also needs to consider whether it is establishing incentives or disincentives for safe methods of crude oil transportation. Providing incentives such as not imposing a fee on deepwater ports and eliminating disincentives by broadening liability enforcement may or may not require substantial revision of the approach found in S.686. It is however imperative that detailed consideration be given to this issue while drafting the bill to be reported out by the subcommittee.

If the subcommittee has questions, I would be pleased to address them. LOOP would also welcome the opportunity to consult with the subcommittee regarding the incentive/disincentive structure to be provided by this legislation or any other matter as to which you think our expertise is relevant.

Testimony of

CHARLES J. DIBONA

PRESIDENT,

AMERICAN PETROLEUM INSTITUTE

on

Oil Spill Liability and Compensation

Before the

SUBCOMMITTEE ON ENVIRONMENT POLLUTION

of the

SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

Washington, D.C.

July 21, 1989

MR. CHAIRMAN, MY NAME IS CHARLES J. DIBONA, PRESIDENT OF THE AMERICAN PETROLEUM INSTITUTE (API). API IS A TRADE ASSOCIATION OF OVER 200 COMPANIES INVOLVED IN ALL ASPECTS OF THE OIL AND NATURAL GAS INDUSTRY, INCLUDING EXPLORATION, PRODUCTION, TRANSPORTATION, REFINING AND MARKETING. I WELCOME THIS OPPORTUNITY TO COMMENT ON THE OIL SPILL LIABILITY AND COMPENSATION LEGISLATION BEFORE THIS SUBCOMMITTEE.

LET ME ASSURE YOU THAT OUR INDUSTRY SUPPORTS STRONG LEGISLATION TO REDUCE THE ECONOMIC IMPACT OF OIL SPILLS. FOR 15 YEARS, API HAS VIGOROUSLY ADVOCATED A COMPREHENSIVE APPROACH PROVIDING THE FINANCIAL RESOURCES AND RESPONSE CAPABILITIES NEEDED TO DEAL IMMEDIATELY WITH ANY OIL SPILL FROM ANY SOURCE IN ANY U.S. NAVIGABLE WATER. WE HAVE REPEATEDLY EXPRESSED TO THIS SUBCOMMITTEE AND TO THE FULL ENVIRONMENT AND PUBLIC WORKS COMMITTEE OUR SUPPORT FOR COMPREHENSIVE FEDERAL LEGISLATION COVERING OIL SPILL LIABILITY AND COMPENSATION. THE TRAGIC OIL SPILL IN ALASKA'S PRINCE WILLIAM SOUND AND THE SPILLS IN LATE JUNE UNDERSCORE THE NEED TO MOVE AHEAD WITH SUCH LEGISLATION WITHOUT DELAY.

WE WANT TO ASSURE YOU THAT API IS READY TO PROVIDE ALL THE ASSISTANCE WE CAN TO YOUR SUBCOMMITTEE TO ACHIEVE THIS OBJECTIVE AND TO ESTABLISH A SINGLE FEDERAL REGIME THAT WILL ELIMINATE THE OVERLAPS, CONFLICTS AND DEFICIENCIES OF EXISTING OIL SPILL COMPENSATION AND LIABILITY ARRANGEMENTS. WE BELIEVE THAT SOUND

Page 2

LEGISLATION CAN AND SHOULD BE ENACTED THIS YEAR.

THE FUNDAMENTAL PREMISE OF OIL SPILL COMPENSATION AND LIABILITY ARRANGEMENTS SHOULD BE THAT ALL LEGITIMATE CLAIMS MUST BE PAID, AND ALL CLAIMANTS WHO HAVE INCURRED ACTUAL LOSSES MUST BE COMPENSATED TO THE FULL EXTENT OF THOSE LOSSES. THEREFORE, API BELIEVES COMPREHENSIVE FEDERAL OIL SPILL LIABILITY AND COMPENSATION LEGISLATION SHOULD INCORPORATE FOUR FUNDAMENTAL PRINCIPLES:

FIRST, THE SPILLER SHOULD BE "ON THE FRONT LINE," RESPONSIBLE FOR REMOVAL COSTS AND DAMAGES DIRECTLY RESULTING FROM THE SPILL, UP TO THE APPLICABLE LIABILITY LIMIT.

SECOND, ALL OIL SPILL REMOVAL COSTS, ECONOMIC LOSSES DIRECTLY RESULTING FROM THE DISCHARGE, AND ACTUAL COSTS INCURRED TO RESTORE OR REPLACE ENVIRONMENTAL LOSSES, SHOULD BE COMPENSATED.

THIRD, TO SUPPLEMENT THE LIABILITY OF THE SPILLER, COMPANIES THAT HANDLE OIL SHOULD CONTRIBUTE TO A REASONABLY SIZED FUND TO HELP MEET THE COST OF REMOVAL AND COMPENSATION FOR DIRECT DAMAGE.

FOURTH, THE COMPREHENSIVE FEDERAL REGIME SHOULD BE THE ONLY LIABILITY SYSTEM, SHOULD OIL BE DISCHARGED INTO THE MARINE ENVIRONMENT.

LET ME EXPLAIN WHY THESE PRINCIPLES ARE SO IMPORTANT. VERY

Page 3

FEW STATES PROVIDE FUNDS FOR THIRD PARTY DAMAGES AND THOSE THAT DO HAVE FUNDS TOO SMALL TO REIMBURSE LEGITIMATE CLAIMS ARISING OUT OF A CATASTROPHIC SPILL. IF YOU HAVE CONSTITUENTS WHO ARE UNABLE TO PURSUE THEIR LIVELIHOOD DUE TO A SPILL, THEY SHOULD NOT HAVE TO HIRE ATTORNEYS, FILE NUMEROUS LAW SUITS, AND WAIT YEARS TO RECEIVE REIMBURSEMENT FOR LOST INCOME OR OTHER DAMAGES. WITH A SINGLE, LIABILITY REGIME AND FEDERAL FUND, REIMBURSEMENT WOULD BE SWIFT AND FAIR.

THESE CONCEPTS WORK JUST AS EFFICIENTLY FOR THE INDUSTRY. SHIP OWNERS AND FACILITY OWNERS NEED TO OPERATE UNDER A SINGLE SET OF RULES AND NOT BE SUBJECT TO THE LAWS AND REGULATIONS OF A VARIETY OF JURISDICTIONS. A UNIFORM, COMPREHENSIVE REGIME WOULD ENABLE A RESPONSIBLE PARTY TO KNOW HIS LEGAL STATUS AND RESPONSIBILITIES IN THE EVENT OF A SERIOUS OIL SPILL.

NOW TO TURN TO THE OIL SPILL LIABILITY AND COMPENSATION BILLS BEFORE THIS SUBCOMMITTEE, S.1066 AND S.686.

S.1066

API IS CONCERNED THAT S.1066 DOES NOT EFFECTIVELY MEET THE FOUR PRINCIPLES OUTLINED ABOVE, ESPECIALLY THE FOURTH WHICH CALLS FOR A SINGLE LIABILITY SYSTEM FOR OIL SPILLS. S.1066 INCORPORATES PROVISIONS WHICH WOULD IMPLEMENT THE INTERNATIONAL CIVIL LIABILITY CONVENTION AND FUND CONVENTION AND THEIR RESPECTIVE PROTOCOLS ONCE THEY HAVE BEEN RATIFIED. THESE

Page 4

INSTRUMENTS, WHICH INVOLVE INTERNATIONAL OIL SPILL LIABILITY AND COMPENSATION ARRANGEMENTS, RAISE QUESTIONS AS TO HOW THESE COMPLEX ARRANGEMENTS WOULD INTERFACE WITH DOMESTIC OIL SPILL LAW UNDER CONSIDERATION AND THE PRECEDENCE THEY WOULD HAVE. AS EXAMPLES, THE CIVIL LIABILITY AND FUND CONVENTIONS AND THEIR RESPECTIVE PROTOCOLS ARE LIMITED SOLELY TO SHIP RELATED OIL SPILLS. MOREOVER, THEY WOULD ONLY COVER SPILLS OF PERSISTENT OILS WHICH ARE DEFINED AS CRUDE OIL, FUEL OIL, HEAVY DIESEL OIL AND LUBRICATING OILS. PRESENTLY ALL DOMESTIC LEGISLATION PENDING IN CONGRESS ON OIL SPILL LIABILITY AND COMPENSATION COVERS BOTH CRUDE OIL AND PETROLEUM PRODUCT SPILLS FROM OFFSHORE DRILLING AND PRODUCING FACILITIES, PETROLEUM FACILITIES ADJACENT TO NAVIGABLE WATERS AND NON-SEAGOING BARGES AS WELL AS FROM BOTH U.S. AND FOREIGN FLAG TANKERS.

CONSEQUENTLY, API SUGGESTS DELETION OF PROVISIONS WHICH WOULD IMPLEMENT INTERNATIONAL CIVIL LIABILITY CONVENTION AND FUND CONVENTION AND THEIR RESPECTIVE PROTOCOLS. THE ADVISABILITY OF RATIFICATION SHOULD BE CONSIDERED ONLY AFTER DOMESTIC LEGISLATION HAS BEEN ENACTED AND IMPLEMENTED. TO ENACT IMPLEMENTING PROVISIONS AT THIS TIME WOULD BE ILL-ADVISED. OIL SPILL LIABILITY AND COMPENSATION LEGISLATION SHOULD BRING UNDER A SINGLE UMBRELLA ALL ASPECTS OF OIL SPILL LIABILITY AND COMPENSATION TO ENSURE THAT ALL LEGITIMATE CLAIMS ARE PAID, AND ALL CLAIMANTS WHO HAVE INCURRED ACTUAL LOSSES ARE COMPENSATED TO THE FULL EXTENT OF THOSE LOSSES. POSTPONING CONSIDERATION OF RATIFICATION OF THE CONVENTIONS AND THEIR PROTOCOLS UNTIL

Page 5

DOMESTIC LEGISLATION HAS BEEN ENACTED WILL ENSURE THIS GOAL IS MET.

S.686

WHILE S.686 DOES NOT CONTAIN PROVISIONS RELATING TO THE INTERNATIONAL CIVIL LIABILITY CONVENTION AND FUND CONVENTION AND THEIR RESPECTIVE PROTOCOLS, IT ALSO DOES NOT MEET THE FOURTH PRINCIPLE. API HAS CONSISTENTLY STRESSED THE NEED TO ESTABLISH A SINGLE, COMPREHENSIVE FUND TO SUPPLEMENT THE LIABILITY OF THE RESPONSIBLE PARTY AND TO REPLACE THE PATCHWORK OF EXISTING STATE AND FEDERAL LIABILITY LAWS AND FUNDS.

HOWEVER, UNDER SECTION 106 OF THE BILL, AN ACTION FOR DAMAGES UNDER STATE LAW, ADMIRALTY LAW, OR COMMON LAW TO RECOVER DAMAGES IS NOT PRECLUDED. IN THIS SENSE, IT IS OPEN-ENDED AND PROVIDES NO PROTECTION AGAINST SUCH LEGAL ACTIONS. THIS UNDERMINES THE PRINCIPAL PURPOSE OF FEDERAL OIL SPILL LEGISLATION, WHICH IS ELIMINATION OF THE PATCHWORK OF EXISTING LAWS TO ENSURE SWIFT AND FAIR COMPENSATION.

ACCORDINGLY, IT IS ESSENTIAL THAT THIS BILL BE REVISED TO PROVIDE THAT NO ACTION BE BROUGHT IN A COURT OF THE UNITED STATES OR OF ANY STATE OR POLITICAL SUBDIVISION THEREOF, FOR ANY REMOVAL COSTS, DAMAGES OR OTHER RELIEF RESULTING FROM A DISCHARGE OF OIL FROM A VESSEL OR FACILITY EXCEPT AS PROVIDED BY FEDERAL LEGISLATION.

Page 6

IN ADDITION, WHILE API AGREES THAT INDIVIDUAL STATES SHOULD BE ABLE TO MAINTAIN FUNDS TO PAY FOR TRAINING, RESEARCH AND EQUIPMENT PURCHASES AND FOR CLEANUP AND REMOVAL OF LAND SPILLS, S.686 WOULD SANCTION THE CONTINUED EXISTENCE OF STATE FUNDS TO PAY FOR REMOVAL COSTS AND DAMAGES FOR MARINE SPILLS THAT WOULD ALSO BE COVERED BY THE FEDERAL FUND. UNDER THIS PROVISION, DOUBLE TAXATION WOULD BE SANCTIONED AND CONFUSION OVER JURISDICTION AND APPLICATION WOULD RESULT.

TO CLARIFY THIS MATTER AND ELIMINATE CONFUSION, API RECOMMENDS THAT S.686 BE REDRAFTED TO PERMIT STATES TO ESTABLISH AND MAINTAIN OIL SPILL FUNDS, WITH THE PROVISIO THAT SUCH FUNDS NOT BE USED TO COMPENSATE ANY PERSON FOR REMOVAL COSTS AND DAMAGES RESULTING FROM A DISCHARGE OF OIL FROM A VESSEL OR FACILITY.

CONCLUSION

IN CONCLUSION, API SUPPORTS COMPREHENSIVE OIL-SPILL LEGISLATION WHICH WILL BRING UNDER A SINGLE UMBRELLA ALL ASPECTS OF OIL-SPILL LIABILITY AND COMPENSATION TO ENSURE THAT ALL LEGITIMATE CLAIMS ARE PAID, AND THAT ALL CLAIMANTS WHO HAVE INCURRED ACTUAL LOSSES ARE COMPENSATED TO THE FULL EXTENT OF THOSE LOSSES. THIS LEGISLATION IS LONG OVERDUE.

IT IS ESSENTIAL, HOWEVER, THAT ANY SUCH LEGISLATION CLEARLY DEFINE THE LIABILITY OF EACH SHIPOWNER AND FACILITY OWNER, AS WELL AS CIRCUMSCRIBING THE SCOPE OF CLAIMS WHICH CAN BE MADE ON

Page 7

THE RESPONSIBLE PARTY AND ON THE FUND. COMPENSABLE CLAIMS SHOULD BE LIMITED TO OIL SPILL REMOVAL AND DAMAGE COSTS DIRECTLY RESULTING FROM THE DISCHARGE, PROVEN ECONOMIC LOSSES, AND COSTS ACTUALLY INCURRED TO RESTORE OR REPLACE ENVIRONMENTAL LOSSES.

JUST AS IMPORTANTLY, SHIP OWNERS AND FACILITY OWNERS NEED TO OPERATE UNDER A SINGLE SET OF RULES AND NOT BE SUBJECT TO THE LAWS AND REGULATIONS OF A VARIETY OF JURISDICTIONS. A UNIFORM, COMPREHENSIVE REGIME WILL ENABLE A RESPONSIBLE PARTY TO KNOW HIS LEGAL STATUS AND RESPONSIBILITIES IN THE EVENT OF A SERIOUS OIL SPILL.

WE OFFER THESE COMMENTS IN A SINCERE EFFORT TO BE CONSTRUCTIVE AND TO ASSIST IN DEVELOPING THE BEST POSSIBLE OIL SPILL LIABILITY AND COMPENSATION LEGISLATION. API IS PREPARED TO DO ALL WE CAN TO WORK WITH THIS SUBCOMMITTEE IN FORMULATING LEGISLATION WHICH WILL MEET THIS OBJECTIVE.



THE WILDERNESS SOCIETY

STATEMENT OF KARIN SHELDON, SENIOR COUNSEL FOR THE WILDERNESS SOCIETY, TO THE UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS ON S.686, OIL POLLUTION LIABILITY AND COMPENSATION ACT OF 1989, JULY 21, 1989

Good morning Mr. Chairman, my name is Karin Sheldon. I am Senior Counsel to The Wilderness Society, a national environmental organization with more than 309,000 members. TWS is dedicated to the protection and preservation of America's public lands, including our wilderness areas, national parks, forests and wildlife refuges, and the host of natural resources found within them. I am testifying today on behalf of The Wilderness Society and Defenders of Wildlife, a national organization of more than 80,000 members, devoted to protecting and conserving this nation's rich abundance and diversity of wildlife and wildlife habitat.

The Wilderness Society and Defenders of Wildlife are newcomers to the debate over oil spill liability. We are compelled to enter this debate because of the recent spate of oil spills, particularly the catastrophic oil spill in Prince William Sound caused by the grounding of the Exxon Valdez. Ninety nine percent of the lands damaged by that spill are public lands, designated by Congress for national forests, parks and wildlife refuges.

It is apparent from the circumstances surrounding this tragedy that present oil spill liability and compensation arrangements have not prompted corporate decisionmaking which gives sufficient weight to safety and environmental concerns. The spill in Prince William Sound need not, and should not have occurred. What it teaches us is that it is critical for Congress to reevaluate the current approach to oil spill liability arrangements and consider legislation which will incorporate principles to assure that such a tragedy will not happen again.

These principles are basic to a system which holds corporations responsible for their management decisions and conduct. Briefly, they include: (1) a requirement that corporations which produce, process and transport oil operate under the highest standard of care; (2) strict and unlimited liability for the consequences of oil spills; (3) no pre-emption of state law; (4) criminal penalties for disregard of applicable law or negligent conduct, and (5) full restoration of damaged and lost natural resources.

S. 686, Senator Mitchell's bill, incorporates many of these principles, as does S. 1223, Senator Lieberman's bill. The International Oil Spill Protocols and a number of the other bills currently under consideration by various committees of the Congress do not. In my testimony today I would like to discuss three of the most critical concepts for any legislation concerning oil spill liability. A detailed critique of the Protocols is attached to my written statement.

1. Pre-Emption

The primary reason given by the proponents of the Protocols and several of the proposed bills is that they would replace the existing "patchwork" of federal and state law

with a uniform system capable of responding to all oil spills. In a sense our domestic system of law is a patchwork. It reflects the differing interests and concerns of the states which ship and receive oil, and which must protect their citizens and their fragile coastal environments from the impacts of spilled oil. It incorporates, too, the interests of the federal government, as a significant participant in the world oil market, and as trustee for the American people in stewardship of the public lands and protection of the environment. Although the patchwork of American law is not as strong or comprehensive as The Wilderness Society and Defenders of Wildlife would prefer, what we have now is vastly better than pre-empting applicable state and federal law for a single international or federal regime.

As stated by Senator Mitchell in his testimony to the Foreign Relations Committee on July 13, 1989, ratification of the International Protocols will pre-empt important provisions of state and federal law. Pre-emption is the inevitable result of several of the currently proposed bills as well. The weight of court decisions in this country, including specifically the Supreme Court's ruling in Illinois v. City of Milwaukee concerning the regulation of water pollution, is that the existence of a comprehensive regulatory scheme--even if it is an inadequate one with obvious loopholes--supplants other applicable laws unless those laws are specifically preserved.

S. 686 acknowledges the interests and rights of the states to augment the federal statutory scheme with their own state laws. Section 106(a) provides that the Act shall not be construed as preempting any state from imposing additional liability or other requirements for the discharge of oil. Such a provision is consistent with many federal statutes which recognize the right of states to set more stringent limits on activities occurring within their boundaries than does the federal government.

Section 106(b) preserves the authority of the states to establish or continue state funds to pay costs or damages arising out of oil pollution. This section is also a positive addition to the federal compensation scheme.

2. Liability

The most significant factor in corporate decisionmaking is the risk to the company's bottom line. The liability limits in the Protocols, and in all of the proposed federal legislation, except S. 1223 which has eliminated liability caps, are too low to exert much influence on corporate decisions about safety and environmental protection. More importantly, they are too low in relation to the extent of damage which can be caused by an oil spill of the magnitude of the Exxon Valdez and the costs of clean up and restoration of natural resources. At the \$500 per gross ton measure of S. 686, the liability limit for the Exxon Valdez would be \$55,415,500 although the damage to Prince William Sound and the Gulf of Alaska has already been estimated to be several hundred million dollars.

Liability limits for the transportation of oil must be based on and related directly to the risk involved in that activity and the costs of coping with the consequences if the risk results in disaster. Otherwise, the limits will continue to be what they are now--a cost of doing business or an expense shared across the industry which simply increases the price of petroleum products to the consumer without altering corporate behavior.

The Wilderness Society and Defenders of Wildlife urge that serious consideration be given to eliminating all limits on liability for all ocean going tankers carrying oil. Elimination of liability limits would make clear to the industry that Congress recognizes oil transportation an intrinsically hazardous activity which should be carried out only by companies with sufficient stability, judgement and resources to assume the risk.

If Congress determines that some monetary limits to liability are appropriate, the limits should reflect not only tanker size and weight but the environment in which the tankers operate and the resources which are at stake. Furthermore, the availability of

monetary limits on liability should be conditioned upon demonstrated corporate financial responsibility, as provided in Section 104 of S. 686, and use of the best available safety technology. In other words, liability limits should be available to tanker owners and operators only if they show that they have significant financial resources and that they are using state of the art safety equipment and systems--double hulls, double bottoms, compartmentalization, navigation equipment, spill response gear etc.

Linking liability limits and corporate responsibility is logical and appropriate. Neither the American people nor the environment should continue to be the victim of oil shippers who don't care because they don't have to. By requiring financial responsibility, and best available safety construction, systems and equipment as a condition of operating in U.S. waters and calling in U.S. ports, and as a pre-requisite to liability limits, Congress will do much to protect the public and the environment from the rust bucket, the single vessel company with no other assets and the outfit that is not concerned whether its employees are qualified or comply with law.

3. Liability Standards and Breaking Liability Limits

The International Protocols channel all liability for oil spill damage to the ship owner, and establish monetary limits on that liability. As Senator Mitchell testified last week, the Protocols also impose an impossible burden of proof on claimants who seek to break that limit, even when the damages exceed it. S. 686 fixes liability on the owner or operator, as those terms are defined in the Clean Water Act. It is not clear whether the bill provides strict joint and several liability, as does S. 1223. We think it should, and should say so explicitly, as well as stating that no distinction is to be made for liability purposes between the owner and the operator. The Wilderness Society and Defenders of Wildlife are also of the opinion that if Congress chooses to impose monetary limits on liability, the standard for breaking those limits should be negligence on the part of the owner or operator, not the more stringent "willful misconduct or gross negligence within the privity or knowledge of the owner or operator" included in S. 686. This latter standard requires actual, not merely constructive knowledge, and a personal participation of the owner or operator in some fault or negligence causing or contributing to the injury suffered. Obviously, this standard places a difficult burden on claimants, particularly in establishing that the conduct which resulted in damage was "within" the privity or knowledge of the owner or operator." The circumstances of the Exxon Valdez spill indicate clearly that this standard is not appropriate to modern oil shipping.

4. Natural Resource Damage

One fundamental purpose of an oil spill liability and comprehensive regime is to provide government the authority and the means to pay (or require the spillers to pay) for the costs of clean up, rehabilitation and restoration of damaged natural resources. Included in these costs must be those necessary to assess the extent and nature of the damage done and to plan properly for clean up, restoration and, if required, replacement of resources which are irretrievably lost.

Any federal legislation considering oil spill liability arrangements must articulate clear goals and standards for clean up and restoration efforts. It must demand that clean up be complete, not left to nature after several months of rock mopping. Damaged natural resources must be fully restored, or if that is not possible, replaced by equivalent resources. The goal should be to return the environment to pre-spill conditions.

Guidance is developing appropriate measures for damage assessment and recovery is available in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), better known as Superfund, and in the July 14, 1989 decision of the Court of Appeals for the D.C. Circuit in National Wildlife Federation et al. vs. Department of the Interior. The D.C. Circuit invalidated the Department of the Interior's natural resource damage assessment regulations, in large part because the regulations limited damages

recoverable by government trustees for harmed natural resources to "the lesser of" the cost of restoring or replacing the equivalent of an injured resource, or the lost use value of the resource. The court held that Interior's approach was directly contrary to the expressed intent of Congress, and therefore invalid. The court also held that a regulation prescribing a hierarchy of methodologies by which lost use value could be measured, which focused exclusively on the market values for such resources, was not a reasonable interpretation of the statute.

S. 686 identifies as factors to be considered in the procedures to determine natural resource damage, replacement value, use value, and the ability of the ecosystem or resource to recover. Our concern with the bill as written is that it would permit NOAA to rely on lost use value, rather than replacement cost as the measure of damages, as long as "consideration" was given to the other factors. The value of the resources damaged and destroyed by oil spills--graceful sea birds, playful otters, the complex web of benthic and marine organisms, the aesthetic beauty of rocky shore does not depend on whether they can be eaten or worn by humans. The only appropriate measure for damages from oil spills is replacement cost.

5. International Protocols

The Wilderness Society and Defenders of Wildlife feel strongly that The International Oil Spill Protocols do not contain any of the basic provisions necessary to change corporate conduct to prevent spills from occurring and hold corporations responsible for their conduct if they do. The Protocols will supplant federal and state laws that attempt to make corporations responsible for their decisions with an international regime that is tailored to avoid such responsibility. Four examples will serve to illustrate this point. These and others are described in greater detail in the written analysis attached to my statement.

1. The Protocols do not establish a comprehensive scheme covering all major oil spills. For example, they explicitly exclude spills of "non-persistent oils," such as heating oil and gasoline. The oil spilled off the coast of Rhode Island recently was Number 2 heating oil, a non-persistent oil. No one can state with certainty, therefore, that the Protocols would provide any compensation for the damage done to Rhode Island's lovely coast, or to its fishermen or tourists. At the same time, no one can say with certainty that the Protocols would not supercede federal and state laws which would otherwise be applicable. The Conventions state that they "shall apply exclusively to pollution damage" occurring in the territorial sea or exclusive economic zone of Contracting States. Pollution damage is very broadly defined.

As I have stated earlier in my testimony, the weight of court decisions in this country, including specifically the Supreme Court's ruling in Illinois vs. City of Milwaukee concerning the regulation of water pollution, is that the existence of a comprehensive regulatory scheme--even if it is an inadequate one with obvious loopholes--supplants other applicable laws unless those laws are specifically preserved. The Conventions contain no express reservation of the applicability of domestic law to oil spills.

2. The Protocols effectively repeal a host of significant provisions in federal and state law. For example, the principle of strict, joint and several liability, which is a feature of every federal and state law dealing with spills of oil or other hazardous materials--more than 30 different statutes--is replaced by something called "channelling" in which all liability is imposed on the vessel owner--an owner who may be a single ship corporation located in a file drawer in Liberia or Greece. Under the Protocols, except in the rarest of circumstances, no liability would be incurred by ship operators, pilots, charterers or members of the crew, although, as a practical matter, they may have more to do with the operation and maintenance of the vessel than the owner.

The Protocols limit the owner's liability to a predetermined maximum amount. This limit cannot be broken by claimants unless they are able to prove that the pollution damage resulting from the oil spill was caused by the personal act of the owner, committed with the intent to cause the damage or recklessly knowing the damage would result. This is an impossible burden of proof.

The owner, by contrast, may avoid all or part of his liability by establishing that the damage was caused by the simple negligence of the person suffering the damage or the negligence of any government or other authority responsible for maintenance of navigation aids. If the owner is successful in limiting his liability under the Protocols, the claimants are left virtually without recourse. They must prove that the damage resulted from the personal act of the operator, pilot or crew member responsible, committed with the intent to cause such damage or recklessly knowing that damage would result.

Think of these standards in terms of the Exxon Valdez spill. Exxon, as the ship owner, would be liable to the extent of the Conventions' limit, regardless of the total amount of damage, unless claimants prove that Exxon personally intended to devastate Prince William Sound and acted to further that intent. On the other hand, if the Company can show that the damage resulted, at least in part, because the Coast Guard did not properly light Bligh Reef, or the State of Alaska refused to allow the use of dispersants in the clean-up, or the captain improperly placed an unqualified mate at the helm, then it will be exonerated from liability. Where will the claimants go then? How will they meet their burden of proof? What happened to the single, comprehensive, efficient system for response and compensation?

3. The Protocols would repeal the statutes of limitations which generally apply under American law, and would bar all claims for damage, even to the environment, which are not made within 6 years of the incident causing the spill.

Again in the case of the Exxon Valdez, the State of Alaska, the EPA and the Coast Guard all report that the full extent of the environmental damage done in Prince William Sound and along the Kodiak Archipelago will not be known for many years. Under the Protocols, actions for these damages will be barred before the damage is even detected. In contrast, under the generally applicable rule in the United States, which is that a statute of limitation begins to run when the damage is discovered, future claims are preserved.

4. Finally, the Protocols would cut back severely on the circumstances in which and the degree to which natural resources would be restored.

The Conventions impose liability only for the "costs of reasonable measures of reinstatement actually undertaken or to be undertaken." The Protocols also prohibit the calculation of natural resource damages "on the basis of an abstract quantification of damage calculated in accordance with theoretical models." These limits are inconsistent with United States law and regulation which recognize that "reasonable measures of reinstatement" often cannot be determined for some time, generally after lengthy and expensive studies, and that some method for calculating natural resource damage must be developed in order for non-economic resources, such as wildlife species other than fish and shellfish, to be valued at all.

Furthermore, in cases where natural resources cannot be "reinstated"--that is, the environment has been so damaged that it will not longer sustain the original quantity and diversity of plant and animal life--United States policy is to restore the system by reintroduction of similar flora and fauna.

Less than six weeks after the grounding of the Exxon Valdez in Prince William Sound--and at a time when workers were still mopping up oil with paper towels--the President of Exxon said that within ten years the environment would restore itself

naturally. Should clean-up operations have been suspended then? That questions is impossible to answer but it sits front and center in the Protocols.

6. Conclusion

Mr. Chairman, we feel like the small boy at the Emperor's parade. We may not know much, but we know the Emperor is not wearing any clothes. Our conclusion is that our patchwork of state and federal law, with all of its flaws and shortcomings, offers significant advantages over the Protocols and over many of the proposed bills. We urge the Senate not to ratify the Protocols, but to turn its attention instead to enacting legislation designed to promote corporate decisionmaking that prevents oil spills from occurring and places the responsibility for clean-up and restoration squarely where it belongs, without limit, when such spills occur. S. 686 and S. 1223 are steps in the right direction.

Thank you.



THE WILDERNESS SOCIETY

ANALYSIS OF THE INTERNATIONAL OIL SPILL PROTOCOLS BY THE WILDERNESS SOCIETY

The Wilderness Society and Defenders of Wildlife feel strongly that The International Oil Spill Protocols do not contain basic provisions necessary to change corporate conduct to prevent spills from occurring and hold corporations responsible for their conduct if they do. The Protocols will supplant federal and state laws that attempt to make corporations responsible for their decisions with an international regime that is tailored to avoid such responsibility.

1. The Protocols would supercede applicable United States law.

Once approved by the Senate, the Protocols are likely to become the only recourse available for the damage done by oil spills.

Both Protocols state in Article II that "This Convention shall apply exclusively to pollution damage caused in the territory, including the territorial sea, of a contracting state."

Pollution damage is defined very broadly as:

- (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur. . .
- (b) the costs of preventive measures and further loss or damage caused by preventive measures.

The plain meaning of this language suggests that currently applicable provisions of federal and state laws would be effectively repealed. These would include the oil spill and other relevant sections of the Clean Water Act, the Trans-Alaska Pipeline Act, the Deepwater Port Act, the Outer Continental Shelf Lands Act, the Comprehensive Response, Compensation, and Liability Act, or "Superfund," as well as the statutory laws of at least 24 states and the common law of all others.

The Department of State has previously taken the position, in a written opinion on July 22, 1970, in a hearing before the Senate Subcommittee on Air and Water Pollution, that other laws would be superceded by the Conventions. When Senator Muskie asked whether the Clean Water Act would continue to apply to oil spills on the Great Lakes if the earlier version of the Protocols were approved by the Senate, the State Department replied in writing as follows:

Since the Convention applies to all damages occurring in the territory of the United States (Article II), it will supercede the Act.

Furthermore, as the Supreme Court concluded in Illinois v. City of Milwaukee the existence of a comprehensive regulatory scheme--even an inadequate one--supplants other applicable laws, unless they have been expressly preserved. The Conventions do not expressly preserve domestic law.

Of course, it is possible that only those provisions of other laws which are either directly contrary or inconsistent with the Conventions would be superceded, but this will require extensive litigation to clarify. It is, therefore, instructive to examine some of the major provisions and policies of the Conventions that would supercede existing U.S. law.

(a) "Channeled" Liability

The Conventions require that liability be "channeled" to the shipowner alone. There is no liability on the part of ship operators, pilots or others who might otherwise be legally responsible for oil spills unless they intentionally caused the damage or acted recklessly knowing that damage was the probable result.

Channeling is directly contrary to every federal statute which deals with liability for releases of oil or other hazardous substances. According to an analysis prepared for the U.S. Coast Guard in 1983, it is also contrary to the laws of the 24 states which had, as of that date, enacted statutes. Finally, channeling is contrary to the common law generally applicable in such situations. Thus, the legal effect of the Conventions would be to set aside policy decisions made in the Congress, in 24 state capitals, and a multitude of courts.

Although the exact language varies from one law to another, the general rule of U.S. law is to impose joint and several liability for spills of oil and other hazardous substances. There are excellent policy reasons for this. One is that very often the person who charts a vessel may, as a practical matter, have more to say about her operation and maintenance than the owner.

Professor L.F.E. Goldie, who then occupied the Charles H. Stockton Chair of International Law at the Naval War College in Newport, Rhode Island, described the channelling provisions contained in the 1969 IMCO convention as follows:

One frequently finds the charterer, the operator, of a ship is more in control of her than the owner is. There are various kinds of charterparties whereby the manning, operation, victualling and navigation of a ship is in the hands of the charterers, for example, in bare boat charters and demise charters. In charterparties of this kind, the owner has passed the control of his ship to the charterer who is her "operator." The IMCO convention's restriction of liability to the "owner" looks even more horrendous when the practice of flags of convenience is examined. Shipping folk create corporations to give paper names to the ownership of flag of convenience ships, and then give long-term charters (leases, in effect) to the enterprises for whose activities the ships were built in the first place.

The Torrey Canyon is an example of the practice described by Professor Goldie. The vessel was owned by a Bermuda corporation with a paid-up capital of \$20,000, although the tanker itself was valued at \$22 million. Under the Conventions, liability for the spill would be channeled, not to those who operated the Torrey Canyon or those who owned the oil, but to the shell corporation. The Argo Merchant, the last supertanker to threaten the coast of Rhode Island, was owned by a shell corporation, as is the World Prodigy.

To address the problem of shell corporations Congress decided in 1970 in the Clean Water Act that the standard of liability applicable to spills of oil and hazardous substances should be joint and several. It has reaffirmed that decision repeatedly since then, in the Trans-Alaska Pipeline Act, the Outer Continental Shelf Lands Act, and the Deepwater Port Act.

Furthermore, when it came time to enact a law dealing with releases of toxic chemicals, Congress wrote the standard of joint and several liability into the Superfund law. In 1985 and 1986, when the oil and chemical industry sought to weaken this standard, the Congress refused--a position which was fully supported by the Reagan Administration.

The underlying policy reason for Congress' insistence on joint and several liability is simple justice and efficiency. Those who traffic in hazardous substances, including oil transported in million-gallon tankers through pristine waters, are often in the best position to minimize the risks associated with their activities and should share the responsibility for any oil spill. Moreover, when spills do occur, it is fair for all those who created the risk to bear the financial burden. The Conventions eliminate this principle.

(b) Limited Liability

The Conventions limit liability in a number of ways. There is a common perception that the Protocol ceilings exceed the limits of liability contained in federal laws. However, not all federal laws limit liability. The Outer Continental Shelf Lands Act, for example, caps a spiller's liability only for "damages"--that is, injuries to third parties. "Cleanup costs"--actions taken to remove the oil, prevent it from spreading, or restore natural resources--must be paid in full, with no limitation of liability.

This policy was first established by President Nixon following the Santa Barbara blowout in the late 1960's and was continued in the OCS Lands Act Amendments of 1978. The original regulations, and the later-enacted law, apply not only to OCS equipment but to OCS oil, even when contained in tankers during shipment.

Thus, if the total costs of cleaning up a spill of OCS oil, including restoration of natural resources, are \$1 billion, then the spiller's liability is the full \$1 billion, plus the damages to third parties. The Conventions, by contrast, place an overall limit, both for the Fund and for the shipowner, of approximately \$60 million and \$135 million (\$200 million under certain circumstances), respectively. These limits are not additive because the shipowner is entitled to be compensated by the Fund for its own cleanup costs. Thus, the overall limit is an inflexible \$135-200 million.

(c) "Breaking" Liability Limits

The monetary limits for liability in most state and federal laws are below the \$135 to \$200 million that would be available from the Convention Fund. The Conventions' limit, however, is virtually unbreakable, while federal and state laws anticipate a variety of circumstances in which the monetary limit can be set aside.

Generally, the criterion for "breaking" the liability limit in United States laws is some form of negligence on the part of the owner or operator. The Clean Water Act, for example, provides unlimited liability for "willful negligence or willful misconduct." The TAPS law allows breaking of its \$100 million limit if absolute liability is provided under "other applicable Federal or state law." This would allow application of the Alaskan state standard of absolute liability to the Exxon Valdez spill.

The criterion for breaking the Convention limits is much more stringent. Indeed, it appears to be virtually impossible to break--regardless of the circumstances. Article V states:

The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The Message from the President of the United States transmitting the Protocols to the Senate explained the breaking provisions as follows:

Under the CLC Protocol, it will be more difficult to "break" the shipowner's limits of liability, because it must be proved that the damage resulted from the owner's personal act or omission, committed with the intent

to cause damage, or recklessly and with knowledge that the damage would result. In addition to the more stringent standard, the Protocol clearly provides that the owner is entitled to limit liability unless the necessary facts are proved. (emphasis in original)

Under the Convention, therefore, it is unlikely that liability limits would be set aside even for an incident like the Exxon Valdez. To begin with, it would be extremely difficult to prove that the tanker owner personally intended to cause the damage to Prince William Sound and acted to carry out that intent knowing that damage would result. If it is established in court that the captain had been drinking in violation of the company's own rules, and had placed an unqualified mate at the helm, the owner might be able to avoid all liability, leaving the claimants with the burden of proving that the captain caused the damage intentionally or recklessly with knowledge that damage would probably occur.

(d) Other Non-monetary Limits on Liability

The Conventions also limit possible liability in less obvious ways. Inter alia, the Protocols limit the types of oil covered, the damages which are compensable, the circumstances in which payments will be made, and time during which claims can be filed. None of these limitations are included in applicable state and federal laws.

(1) Exclusion of non-persistent hydrocarbons. Under the Conventions, liability and, therefore, Fund availability for cleanup costs and damages exist only for spills of "any persistent hydrocarbon mineral oil, such as crude oil, fuel oil, heavy diesel oil, and lubricating oil."

The President's Message explains at page 8:

There was some consideration given to expanding the coverage of the Protocols to include non-persistent oils, such as gasoline and kerosene, but the Diplomatic Conference was of the opinion that expansion to include such products was not desirable for CLC (the liability protocol) and not feasible for FC (the Fund protocol).

The oil spilled from the World Prodigy was reported as "Number 2 heating oil," also described as gasoline oil. Whether it constitutes a "persistent hydrocarbon mineral oil", within the meaning of the Protocols, is not clear.

There is no question, however, that the World Prodigy spill falls within the coverage of section 311 of the Clean Water Act, which imposes liability for discharges of "oil of any kind and any form," a definition so broad it has been determined to include benzene, a gasoline additive or fraction.

(2) Non-ship spills and Acts of God or War. Spills that do not involve a ship are excluded from the Conventions. So are spills due to Acts of God or Acts of War. In contrast, spills from oil rigs and barges are subject to domestic law, and although United States laws exempt spillers from liability in cases of Acts of God or Acts of War, they do require cleanup, including restoration of natural resources.

(3) Natural resource damages. The Conventions impose liability only for the "costs of reasonable measures of reinstatement actually undertaken or to be undertaken." The Protocols also prohibit the calculation of natural resource damages "on the basis of an abstract quantification of damage calculated in accordance with theoretical models." Both limits are inconsistent with United States law and regulation which recognizes that "reasonable measures of reinstatement" often cannot be determined for some time, generally often lengthy and expensive studies, and that some method for calculating natural resource

damage must be developed in order for non-economic resources, such as wildlife species other than fish and shellfish, to be valued at all.

Furthermore, in cases where natural resources cannot be "reinstated"--that is, the environment has been so damaged that it will no longer sustain the original quantity and diversity of plant and animal life--United States policy is to restore the system by reintroduction of similar flora and fauna. This policy is most clearly expressed in the Superfund law, which requires "acquiring the equivalent of any natural resources injured, destroyed or lost."

Reinstatement of a lost natural resource is allowed by the Conventions only when the costs are "reasonable," according to certain criteria. According to the President's Message, the reasonableness measure is to take into account "duplication of expected natural regeneration and the extent to which such measures at some point may become redundant or disproportionately expensive." This raises a major question of when cleanup and restoration efforts may cease under the Conventions.

Less than six weeks after the grounding of the Exxon Valdez in Prince William Sound--and at a time when workers were still mopping up oil with paper towels--the President of Exxon said that within ten years the environment would restore itself naturally.

Should cleanup operations have been suspended then, despite the fact that oil had saturated hundreds of miles of shoreline? It is impossible to answer that question without some guidance, either from a court--which would require lengthy litigation--or from regulations. Yet the supposed strength of these two Conventions is that they will make rapid and certain cleanups possible.

(4) Statute of limitations. Immediate response to an oil spill is important, but dealing with the long-term consequences is just as vital. It may be years before some kind of damages manifest themselves because scientists know so little about the toxic effects of petroleum compounds on the marine environment, particularly on bottom-dwelling and other marine organisms.

The general rule in this country, in both federal and state laws, is that the statute of limitations begins to run on the date that the injured party discovers (or should have discovered) both the damage and the relationship of the damage to the incident. In cases of environmental damage, such discoveries can occur many years after the incident.

The Conventions require that an action be filed within three years of an incident and place an absolute bar on the filing of actions six years from the date of the incident. In other words, as of March 25, 1995, the filing of claims related to the grounding of the Exxon Valdez would be barred absolutely under the Conventions. The DOT-EPA report to the President on the Exxon Valdez spill states that determining the spill's impacts will "require study of the species of concern throughout their life cycle or longer." "Some of the potentially affected species, such as salmon, have two- to seven-year life cycles, (so) estimating the extent of their injury will require long-term studies," according to the report. Under the Protocols it is likely that claims would be barred before the damage was ever detected, although they could still be entertained under United States laws. If the State of Alaska should discover seven years from now that the Exxon Valdez oil had a "time bomb" effect on the environment, corrective action could still be taken under U.S. law--but not under the Conventions.

2. Recent spills illustrate the shortcomings of the Protocols.

One way to illustrate the shortcomings of the Conventions is to examine their potential applicability to actual spills, such as those in Prince William Sound and Narragansett Bay.

o World Prodigy. It is unclear exactly why the World Prodigy spill occurred. It is known, however, that the vessel bypassed a pilot station and entered Rhode Island waters in violation of state law. She passed on the wrong side of a red buoy and grounded on Brenton Reef, spilling up to 1 million gallons of Number 2 heating oil.

Under current federal law, a response to the incident could be, and was, mounted immediately. That response will include a cleanup, followed by an assessment of natural resource damage and restoration. If natural resources cannot be restored, law provides for their replacement. Although federal law does not compensate victims, Rhode Island law imposes absolute liability for spills of oil. Consequently, under current federal and state law, the owner and operator of the World Prodigy will be required to pay the costs of all cleanup activities, natural resource damage assessment, and restoration and third party injuries.

What would happen under the Conventions?

First, there is doubt whether the Conventions would even apply. The oil spilled by the World Prodigy was Number 2 heating oil, a non-persistent oil. The Conventions cover only spills of persistent hydrocarbons. Despite this fact, as discussed earlier, the Conventions might supercede otherwise applicable law, to extinguish the remedies of the Clean Water Act and the Rhode Island statute.

For the sake of argument, assume that the Conventions would apply to the Rhode Island spill. What would be available?

The Convention Fund would pay for "preventive measures," taken "to prevent or minimize pollution damage," although these must be "reasonable." Compensation for "Pollution damage" is limited to "reasonable measures of reinstatement" (emphasis added). According to the President's Message, in cases of environmental impairment, the "reasonableness" of the measures must take into account "duplication of natural regeneration" and "the extent to which such measures at some point may be expected to become redundant or disproportionately expensive." Some questions arise: Were the measures taken in Rhode Island "reasonable"? Were they duplicative of "natural regeneration"? Were they "redundant"? Were they "disproportionately expensive"? And, finally, who makes those decisions and when?

These questions cannot be answered in advance--which is why federal law, unlike the Protocols, embodies a policy of cleaning up first and asking questions later. If cleanup is to be slowed or stopped by pre-cleanup legalistic decision-making, why have a Fund at all?

Assume for a moment that the wind had blown the oil toward shore, not away, and the damages were truly catastrophic--say \$500 million. The Fund Convention would have paid a combined total of \$200 million for cleanup and damages. In other words, the victims, the governments, and others would receive 40 cents on the dollar.

Since the World Prodigy is owned by Stavros Niarchos, one of the world's richest men, Rhode Island, the United States, and individual victims might consider attempting to "break" his liability limit. As described earlier, under the Conventions the limit can be broken only if the "damage resulted from the owners' personal act or omission, committed

with the intent to cause damage, or recklessly and with knowledge that damage would result," according to the President's Message explaining the Conventions. [Note that emphasis on "personal" was in the Message, not added here.] Could the captain's acts be attributed personally to Niarchos? Was the failure to board a pilot an act which was carried out... with knowledge that damage would result? The difficulty of proving an affirmative answer to these questions is obvious.

3. Domestic Law provides significant advantages over the Protocols.

The premise of every federal and state statute dealing with spills of oil or other hazardous materials is that strict liability--that is, liability which is truly absolute--induces a higher standard of care. Liability is imposed as much to prevent spills as to assure that costs are recovered. The new and unprecedented restraints on liability created by the Protocols will not make shippers more careful or more concerned over possible damage to the environment. The Protocols will not help prevent spills from occurring.

State and federal remedies are not illusory. The government of France and the other victims of the Amoco Cadiz spill who sued in federal court in Chicago recovered approximately \$80 million. In the case of the World Prodigy, federal and state officials concerned about not being fully paid could have legally seized the tanker. But under Article VI of the Convention, U.S. courts would be required to "order the release of any ship or other property belonging to the owner...and similarly release bail or other security furnished."

A third significant advantage of federal and state law over the Conventions is that clean up and compensation funds may be replenished. It is true that the amount in the Clean Water Act cleanup fund at any one time is only \$35 million. However, this is a revolving fund into which Congress can appropriate whatever money is necessary to accomplish a cleanup. Under the Convention, \$200 million is the absolute limit.

The difference between the funds available under domestic law and the Conventions is the difference between a bucket of water and a hose. To extinguish an environmental conflagration, the Conventions offer a single bucket of water. A large amount of money is available, but it is a limited supply nonetheless. Federal laws, on the other hand, provide a replenishing supply: the Clean Water Act may continue to draw on the federal treasury, the OCS Lands Act on spillers for cleanup costs, the TAPS fund on funds available under other Federal or State laws.

Finally, under the Conventions, the statute of limitations would bar claims six years after the date of the spill--before some damages are even known. Domestic law would not.

4. Conclusion

The Wilderness Society and Defenders of Wildlife recognize that current federal laws are inadequate in significant respects to deal with catastrophic oil spills. They are not, however, as inadequate as the Administration and the maritime industry would have us believe. If the Administration would invest as much energy in implementing the existing protective legislation as it has in developing proposals that are manifestly inconsistent with principles of U.S. law, the risks of oil spills would decline dramatically.

We urge the Congress to consider new legislation designed to promote corporate decision-making that prevents oil spills from occurring in the first place and places the responsibility for clean up and restoration squarely where it belongs, without limit, when such spills occur. Such new law must embody certain principles. The recommendations of The Wilderness Society and Defenders of Wildlife are attached. If, however, there is to be no new law, and we must choose between what we have now and what the Protocols would provide, the choice is clear. And that is American law.

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STATEMENT OF JOHN G. CATENA
ON BEHALF OF

THE OCEANIC SOCIETY
ENVIRONMENTAL POLICY INSTITUTE
FRIENDS OF THE EARTH

BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
CONCERNING

OIL SPILL LIABILITY AND COMPENSATION LEGISLATION

I am John G. Catena, Science/Policy Analyst for the Oceanic Society, a 30,000 member national non-profit environmental organization dedicated to the protection, conservation and wise use of ocean and coastal resources. Earlier this year, the Oceanic Society merged with Environmental Policy Institute and Friends of the Earth. My testimony today is presented on behalf of each of those groups. Clif Curtis, Executive Director of the Oceanic Society, regrets that he cannot present this testimony today. In connection with the recent merger, he is attending our organization's Board of Directors/Staff retreat that has been in the planning for several months.

The Exxon Valdez catastrophic spill in Prince William Sound on March 24th, and the three more recent spills in Narragansett Bay, Rhode Island, in the Delaware River estuary system, and in Galveston Bay, Texas are tragedies that did not have to and should not have occurred. In other hearings, my organizations have proposed numerous recommendations to improve our ability to prevent such oil spills from occurring in the future, and I will not repeat that discussion here.

Regrettably, spills of the magnitude of the three that occurred on June 23-24 will continue to occur. Less likely, but also possible, are future catastrophic spills along our coast comparable to the Exxon Valdez tragedy. In either case -- whether the spills be smaller, or catastrophic -- existing international, national and state laws dealing with oil spill liability and compensation are extremely inadequate.

Mr. Chairman, oil spill liability and compensation legislation has a familiar ring to it. Far too familiar. Going back to 1975, bills have been introduced, hearings and markups held, and floor votes recorded in favor of legislation in either the House or Senate. Close, at times, but no cigar. There's been progress, as the two houses have worked out

some of their differences -- but differences still remain. Moreover, given the Exxon Valdez spill, additional improvements are needed. It's time to get the job done -- well before the close of this 1st Session of the 101st Congress. One catastrophic spill without an adequate federal regime is far too many.

What our nation needs, and does not have, is a package of complementary national, state and international laws that will fully compensate victims of oil spills, including damages to natural resources, other property, and loss of income, while also providing for quick, efficient and effective cleanup. As discussed later in my testimony, a comprehensive regime needs to include such features as: preservation of coastal state liability laws; a \$1 billion per incident domestic trust fund, generally, with unlimited access to that fund where necessary to meet international treaty obligations; a broader scope of liability for natural resource damages; and a broader set of exceptions to the limits on liability. Before commenting further on legislative provisions that need to be included though, I'd like to focus briefly on the existing legal state of affairs.

I. Inadequacies of our Current Laws

At present, there exists a fragmented hodge podge of national and state laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, damages that go uncompensated, corporate structures designed to limit exposure, and other legal barriers to victim recoveries -- such as deadlines for filing claims and burdens of proof that favor the spiller.

A. National Law

Under existing national law, at least five statutes deal with the issue of oil spill liability and compensation. Each is different, and each is inadequate.

The Clean Water Act (CWA), 33 U.S.C. Sec. 1251 et seq., which has jurisdiction over most large tanker and inland barge incidents, historically has not provided the kind of protection it should. The Act sets inappropriately low limits of liability for owners and operators of vessels with respect to federal oil spill removal costs and natural damages, and provides no coverage or compensation for other damages.

As documented in a report prepared by the U.S. General Accounting Office in 1983,¹ gross inadequacies exist in the CWA's provisions dealing with spiller responsibility for cleanup costs. Between 1971 and 1982 the U.S. government obligated \$124 million from the CWA's Section 311(k) revolving fund, but recovered only \$49 million from spillers, for a total expenditure of \$75 million in national funds. In individual cases the percentage of cleanup costs expended by the government which have been recovered in courts has been

¹ "International Oil Pollution: Current and Alternative Liability and Compensation Arrangements Affecting the United States," U.S. General Accounting Office, Washington, D.C., February 3, 1983.

even lower.² National funds also are expended in the costly, time consuming litigation required to recoup cleanup expenditures. According to the GAO report, as of 1982 there were 77 cases in litigation involving U.S. government efforts to recover \$36.5 million.

Another problem with the CWA is that its 311(k) revolving fund is inadequate to cover large oil spills. It has never been funded at the authorized level of \$35 million, leaving aside the fact that this amount is far too low. As U.S. Coast Guard Commandant Paul Yost noted at a hearing before the Merchant Marine and Fisheries Subcommittee on Coast Guard and Navigation on April 6, 1989, the amount of money then available in that fund was less than \$4 million. Moreover, since the fund is appropriated from the Treasury, it undercuts budget reduction goals and runs counter to cost internalization policies. These policies are exacerbated by the fact that most courts have found the CWA to provide the only national remedy for recovering oil spill cleanup costs.³ These courts have held that the government cannot use common law maritime tort or nuisance theories to recover its excess cleanup costs.

In addition to the CWA, the Outer Continental Shelf Lands Act Amendments (OCSLAA), 43 U.S.C. Sec. 1801 *et seq.*, the Deep Water Ports Act (DWPA), 33 U.S.C. Sec. 1501 *et seq.*, and the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. Sec. 1651 *et seq.*, all play a role in regulating oil spill liability and compensation. But they provide uneven and inadequate liability standards and scope of coverage for cleanup costs and damages associated with activities covered by each individual law. As for the Exxon Valdez spill, some legal analysts have even suggested that the TAPAA -- which is the principal federal liability and compensation law applicable to the spill other than the CWA -- offers a liability defense if Exxon can prove that the Coast Guard was negligent in not providing more effective navigational aids in Prince William Sound. Moreover, this array of narrowly defined programs can create administrative problems as well. As a result, the goal of compensating those injured may be complicated by questions of regulatory jurisdiction of the various federal agencies. For example, when an oil spill occurs it would be necessary to track down the source of the spill before the applicable statute is applied and compensation claims presented.

Finally, the 1851 Limitation of Liability Act, 46 U.S.C. Sec. 181 *et seq.*, represents a potentially devastating bar to effective recovery of either cleanup costs or damages. Perhaps that Act had merit 135 years ago, since its purpose was to further the interests of this country's budding merchant marine by encouraging shipbuilding and employment of ships. To that end, however, vessel owner liability was limited to "the amount or value of the interest of such owner in such vessel, and her freight then pending" (Sec. 183(a)). While the law does not appear applicable to the Exxon Valdez spill, given the more recent expression of intent under the federal TAPAA law, current application of that 1851 Act elsewhere has resulted in situations where the owner pays next to nothing because the vessel and cargo are a total loss following a catastrophic incident. In two federal cases where the owner of a vessel has invoked the provisions of this Act, the courts have held

² For example, of the \$9.6 million that the Federal government spent to clean up the 1976 Nepco Barge incident, only \$875,000 (or 9%) of total cleanup costs was held to be the legal liability of the owners. In Re Oswego Barge, 439 F. Supp. 342 (D.C.N.Y. 1977).

³ See, e.g., U.S. v. Dixies Carriers, Inc., 627 F.2d 736 (5th Cir. 1980).

that this law, where applicable, has the effect of limiting recoveries under state law, which would include unlimited liability laws.⁴

B. State Law

State statutes on the subject of oil spill liability and compensation vary tremendously as to their adequacy. In 1985 the Oceanic Society undertook a study for the U.S. Coast Guard in which staff examined state laws that address this issue.⁵ The study provided an overview of 24 state oil spill liability and compensation laws, and a digest of statements made by various interested parties since 1975 on the question of state law preemption.

Of the 24 state statutes examined in 1985, there exists substantial variations from state to state with respect to such critical matters as: who is liable; standards of liability; defenses to liability; financial responsibility requirements; cleanup costs; damages; and penalties. In 17 states, the laws provide for unlimited liability, while the other 7 set tonnage-based or overall limits (varying from \$5 million to \$50 million). Eleven of the 24 state laws have established special funds, which cover various costs and damages incurred as a result of a spill, and which are financed from industry assessments, the general treasury, taxes or reimbursements from spillers. Of those state laws that provide funds, 6 place a ceiling on the amount they may accumulate (varying from \$1 million to \$50 million). In practice, the amount actually available is often substantially less. Of those states not maintaining special funds, some laws provide for financial support from the general treasury or other sources.

Given the substantial variations existing in state laws on this subject, the victims of an oil spill affecting one coastal state can fare far better, or worse, than adjacent states' victims in their efforts to receive adequate compensation for their losses. If, for example, a major oil spill occurred in U.S. waters in the Gulf, residents of Florida and Texas would have to deal with state laws containing liability limits and more stringent defenses to liability, while having the benefit of special funds up to certain limits. In contrast, the residents of Alabama, Louisiana and Mississippi could avail themselves of their states' theoretical unlimited liability law provisions and less stringent defenses to liability. However, those states have no special funds available to provide expeditious compensation where the spiller does not do so, whatever the reason. Similar examples of substantial state law variations exist for adjacent coastal states along our east and west coasts.

⁴ See, e.g., *Complaint of Harbor Towing Corp.* 335 F. Supp. 1150 (D.C. Md. 1971); and *In Re Oswego Barge Corp.*, *supra*.

⁵ "Oil Spill Liability and Compensation Legislative Preemption Considerations," prepared by the Oceanic Society for the U.S. Coast Guard, March 1, 1985 (as published in the congressional hearing report: *Oil Pollution Liability*, Hearing before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries, 99th Congress, 1st Sess., March 27, 1985, Serial No. 99-2, at 173-288). (With respect to the one-page table in the study (at 233) comparing key provisions of the 24 state laws, the Coastal States Organization has prepared a more recent summary comparison of those same state laws that highlights other pertinent information.)

C. Common Law

Underlying our national and state laws is a diverse body of common law -- court-made law stemming from the holdings of individual cases, rather than the mandate of statutes. Where statutory remedies are inadequate, victims of oil spills are left with the recourse of common law remedies. As a general statement, common law remedies are ill-equipped to meet claims for cleanup costs and damages. We agree with the GAO report's characterization of the prospects for a damage claimant recovering from a spiller based on common law as "likely to be minimal."⁶

Numerous problems exist under common law. Since it evolves very slowly, the common law system is not yet sufficiently advanced to deal well with the complicated aspects of releases of hazardous substances in today's world. Victims with either property damage or personal injury claims caused by oil pollution must still meet tough statute of limitation requirements and prove proximate cause and cause in fact. The burden of proving causation, even under strict liability, is particularly onerous in suits for damages caused by oil pollution because the scientific state of the art is often inadequate to link damages claimed with the spill at issue. This burden of proof may be sufficiently onerous as to make it difficult for a plaintiff to find legal representation. In addition, since each state and the federal government has its own body of common law, the degree of variations makes it difficult to assess a victim's overall chances for successful recovery of claims.

In general, litigation barriers can be overwhelming in environmental and economic damage suits. The history of litigation arising out of the Amoco Cadiz spill is instructive of the complex process that unfolds when claims for a catastrophic spill are litigated in our courts. Although that spill occurred in 1978, it took until 1984 for the U.S. District Court in Chicago to determine who was liable. Discovery proceedings surrounding claims then became the major focus, and it was only in April, 1986, that the "phase two" trial began in order to decide who should be paid how much for what. In 1988, and early 1989, the court finally issued phase two rulings. Scores of lawyers have been involved in the litigation, and the results thus far reached in the Chicago court are already being challenged through higher court appeals.

D. International Law

In addition to national and state laws presently in effect, there also exists an international regime which has been developed under the auspices of the International Maritime Organization (IMO). Two treaties, the International Convention on Oil Pollution Damage, 1969 (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund) were agreed to in the aftermath of the 1967 Torrey Canyon spill off England's southwest coast.

Those two conventions sought to establish a uniform international oil spill liability and compensation system. The CLC established shipowner liability to persons, including governments, for oil pollution damages and cleanup costs subject to specific limitations.

⁶ GAO Report, *supra*, at 14.

The Fund established an international fund administered by the parties that is supported by contributions calculated on the basis of the number of barrels of seaborne oil received in party states. It also provides for compensation beyond that provided by the shipowner under CLC. The CLC came into force in 1975; and the Fund in 1978.

The United States never agreed to accept those Conventions, despite efforts towards that end during the Nixon and Ford Administrations. Inadequate liability and compensation limits, including their preemptive effect on national and state law, historically have been the reason underlying the Senate's refusal to give its advice and consent. The environmental community strongly supported the Senate's decision not to agree to such ratification, absent substantial revision of those regimes.

II. Establishing a Comprehensive Regime

As noted earlier, a mix of national, state and international components are needed to provide a comprehensive oil spill liability and compensation regime. As discussed more fully below, those components are: enactment of a comprehensive national law; retention of state liability laws and programs; and U.S. ratification of the 1984 CLC/Fund Protocols (which substantially improve the underlying CLC/Fund Conventions). This regime offers a package approach far superior to the present situation. Each component can complement the others to ensure full and fair coverage. The combination of these components achieves the "polluter pays" principle in important respects, while also preserving state laws and enabling the U.S. to ratify and promote broad participation in an international treaty regime that will provide remedies for cleanup and damages in ocean and coastal waters around the globe.

A. Comprehensive National Law

Through enactment of a comprehensive national law, the opportunity exists for the first time in our nation's history to have in place a regime dealing with oil spills that, among other features:

- * fairly assigns risk and internalizes spill-related costs of transporting and handling oil among the responsible party and the oil industry;
- * covers repair, restoration and rehabilitation or replacement of damaged or destroyed natural resources (or acquisition of equivalent resources to the extent restoration is impossible), plus compensation for all lost public and private uses of the resources, and other demonstrated damages;
- * completely reimburses spill victims, including third party damages, and compensates both native Americans and the public for loss of use or enjoyment of natural resources;
- * provides substantial, readily available funds to pay for clean up and damage claims in an expeditious manner, as well as pre-positioning of cleanup equipment and research benefiting both natural resource damage assessment determinations and long term ecological impacts on species and the marine ecosystem;

- makes it much more difficult for the spiller to rely on legal defenses to delay or avoid responsibility;
- establishes more effective incentives for preventing oil discharges; and
- sets the stage for an effective, package approach involving complementary coastal state measures and U.S. participation in the international 1984 revised treaty regime.

S. 686, in many respects, represents the kind of comprehensive national law that is needed. As noted earlier in my testimony, however, several provisions need to be strengthened or added. These recommended changes to S. 686 are detailed in two attachments to my testimony (Appendices A and B). I would be glad to discuss those specific recommendations with you, other Members and the Subcommittee's staff.

B. CLC/Fund Protocols

In the Spring of 1984, the CLC and Fund Conventions were significantly improved at a diplomatic conference in which the U.S. delegation played a leading role. As a private sector advisor on that delegation, Mr. Curtis had the opportunity to witness firsthand those negotiations. From an environmental perspective, the 1984 CLC/Fund Protocols are far from perfect. However, on balance they serve as a necessary global "common denominator" meriting U.S. ratification.

In testimony by the Oceanic Society before the Senate Committee on Foreign Relations on May 15, 1986, Mr. Curtis presented several reasons for supporting U.S. ratification of the Protocols. Summarily stated, (1) there are substantial increases in the liability and compensation that will be borne by shipowner and cargo interests under the Protocols; (2) the extension of the geographic scope of coverage to include coastal state 200-mile Exclusive Economic Zones significantly expands the original Conventions' territorial sea focus; (3) the Protocols clarify and improve the definition of pollution damage; (4) the definition of incident was revised to clearly include pre-spill threat amelioration measures; and (5) the categories of vessels covered was substantially broadened concerning both unladen tankers and combination carriers.

Other testimony at that hearing focused on several problems that could arise absent U.S. ratification and entry into force of the Protocols, i.e., situations involving foreign shipowners where it is often difficult, or impossible, to obtain jurisdiction over them. Even if jurisdiction is obtained against a shipowner in a U.S. court, it can be very difficult to get the country where the ship is registered to enforce our judgment. Finally, most states do not require shipowners to demonstrate financial responsibility, so there is no way to ensure the existence of insurance or assets sufficient to satisfy a large judgment, absent a regime such as that proposed under the Protocols.

⁷ It should also be noted that ships passing the U.S. coast -- either in innocent passage through our territorial sea or Exclusive Economic Zone, but not entering a U.S. port -- can not be subjected to U.S. jurisdiction. However, such jurisdiction (and international Fund protection) would be available under the Protocols. It has been estimated that roughly 10% of vessels in U.S. coastal waters fall under this category.

As has often been said, the only boundaries that our ocean ecosystem knows are artificially created political ones. The three organizations I work for are committed to protection and wise use of the oceans around the globe. As U.S.-centered organizations, we are best equipped to address issues involving this country's coastal seas. At the same time, though, we have organizational links with Friends of the Earth's sister entities in thirty-three countries spanning the globe. Through those relationships, and contacts with other non-governmental organizations outside the United States, we are actively involved in promoting protection and conservation of marine ecosystems far beyond U.S. waters.

Focusing on the United States, U.S. ratification of the CLC/Fund Protocols is needed because those global agreements – in combination with an environmentally sound national regime and the retention of coastal state laws – can assist in our efforts to ensure that victims are fully compensated. If in force, the Protocols could provide as much as \$275 million for a single vessel spill, complementing compensation available under a comprehensive national law or state laws.⁸

In an effort to achieve both the preservation of coastal state liability laws and, if possible, ratification of the international protocols, we recommend that the concepts as set forth in Appendix B be included in S. 686 in relation to the CLC/Fund Protocols. Such language would: (1) mandate the President, in circumscribed instances – if and when the Protocols are in effect (with the U.S. having ratified); the incident involves a vessel covered by the international CLC protocols; and the amount of the awards exceeds monies available under the treaties and the new domestic law – to waive the proposed \$1 billion per incident cap under our domestic Fund to cover those awards; and (2) provide for an "ordering of remedies" or "joinder of the Fund" designed to ensure an alternative source of compensation in those situations where liability claims might otherwise be brought against a tanker owner in violation of the CLC Protocol.

While we are not wedded to the particular language suggested in Appendix B, we are committed to its intent: guaranteeing the preservation of coastal state liability laws; and also, if possible, achieving U.S. ratification of the Protocols without reservation. We have asked the State Department's Office of the Legal Adviser and the Bureau of Oceans and International Environmental and Scientific Affairs, and the Department of Transportation if the Protocols could be ratified, with such language included in the domestic law, without attaching a substantive reservation.

If the above approach is possible, the new domestic law's reference to the scope of coverage for liability under the CLC/Fund Protocols should be clear. In our view, where the scope of liability coverage of domestic or coastal state laws is broader or different

⁸ Assuming the Protocols are ratified, and that they enter into force, H.R. 1465 enables U.S. contributions to the international Fund to be made from our domestic Fund (Sec. 103(a)(5)). A similar provision is necessary for S. 686. As shown in a 1985 study undertaken for the U.S. Coast Guard, a single spill resulting in cleanup costs and damage awards in the range of \$100 million during a 13-year period would be sufficient to move the United States' international fund balance from a net cost to a net benefit over the entire period. See, *Economic Analysis of 1984 CLC and Fund Protocols*, by Temple, Barker & Sloane, Inc., 1985; and *Analysis of Proposed Revisions to the CLC and Fund Conventions*, by Temple, Barker & Sloane, Inc., 1984.

from than that addressed in CLC Protocol, then that liability would not be determined in accordance with the Protocols.⁹ Legal analysts within the Reagan Administration addressed this scope of liability issue as a follow up to a Senate Foreign Relations Committee hearing on May 15, 1986, similarly concluding that the CLC Protocol would not preclude additional or different coverage.

Since the President's forwarding of the CLC/Fund Protocols to the Senate for its "advice and consent" in 1985, it has been obvious that the Protocols can only be considered in the context of a comprehensive domestic law. The merits of giving advice and consent can not be determined without knowing the key elements of an agreed upon domestic regime. In that regard, we believe that the approach taken in H.R. 1465, which includes a Title III regarding the implementation of the protocols, handles this issue appropriately. It provides the mechanism for expeditiously accommodating the Protocols, if ratified, while also stating the obvious, i.e., that "nothing in [Title III] shall constitute ratification of either the [CLC or Fund] Conventions."

C. State Laws

Each time the environmental community has presented testimony before the Congress on oil spill liability and compensation, we have stated that, as a general principle, there should be no limits on liability. These limits undermine the goal of the "polluter pays" principle, since once the limit is reached, either someone else pays or the cleanup and damage costs go uncompensated. In either case, the polluter is subsidized.

At Congressional hearings in 1986, testimony we presented on behalf of the Oceanic Society suggested that preemption of state liability may be the necessary *quid pro quo* to achieving a comprehensive regime. As indicated in today's testimony, as well as in testimony presented before the House Merchant Marine and Fisheries and Public Works and Transportation Committees in 1987 and 1989, that view was mistaken. Based on the expressed views of various interests, the converse is far closer to reality, i.e., that preservation of state liability laws is the necessary *quid pro quo* to achieving a comprehensive regime.

Legislation which does not preempt coastal state liability laws makes sense. States should be able to make the judgment that protection of their state waters and coastlines is crucial to their fishing or tourist industries, or that protection is sufficiently important to them that it outweighs the risk of reduced business activity or higher prices. For catastrophic spills, states that currently have unlimited liability laws on their books (such as Alaska) are better positioned to ensure full compensation if they have their own liability regime to complement or buttress that provided at the federal level. At the other end of the spill spectrum, on past occasions some state officials also have expressed

⁹ A good example might be the situation where natural resource damage resulted in a claim for acquisition of an equivalent marine or estuarine preserve. While the CLC Protocol administrators would likely find that such a claim was not covered by the scope of "pollution damage" under the CLC Protocol, such damages would be cognizable under the new domestic law if legislative language such as that proposed in Appendix A(2) were enacted.

concern that such a regime -- including federal courts and federal administrators -- might not be well attuned to dealing with smaller but more frequently occurring spills and discharges that occur in state waters.

In addition to the merits of non-preemption from a "polluter pays" principle, retention of state liability laws also is consistent with this Administration's view that federal laws must incorporate a cooperative federal/state approach. Towards that end, non-preemption of state laws is the more appropriate response to cooperative federalism and states' rights.

Conclusion

Mr. Chairman, our interest in this issue is to work with you, other Members and staff of your Subcommittee, and others, to achieve essential advances in the legal, financial and institutional framework that are needed to protect people, real and personal property, and our ocean and coastal resources from the inevitable occurrence of oil spills.

The Exxon Valdez oil spill is a "moment in history" that can, given the tragedy it represents, catalyze the reforms that are needed, now, to redress this nation's inadequate regime for oil spill liability and compensation. The clock is running, though, and we need to act.

APPENDIX A

S. 686 in many respects, represents the kind of national law that is needed. However, some provisions need to be strengthened or added.

(1) the definition of "act of God" (Sec. 101(3)) and wherever the term appears in the bill should be deleted; absent that being done, the definition needs to be modified by adding a phrase after the word "character," that would read: "and of a type totally unexpected given the area, the season, or the past history of conditions,"

(2) a definition for the term "incident" should be added to section 101 which tracks H.R. 1465's (section 101(11)) language: "incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or a combination thereof, resulting in the discharge or significant threat of discharge of oil."

(3) the scope of liability (Sec. 102(a)(2)) needs to be broadened by (1) adding language concerning "natural resources," under Sec. 102(a)(2)(C), that would provide that damages: "include but are not limited to damages for injury to, destruction of, or loss of natural resources, including the full costs of assessing such injury, destruction or loss, the full costs of restoration or replacement of the resources (or acquisition of equivalent resources to the extent restoration is impossible), plus compensation for all lost values of those resources,"; (2) deleting the limitation on the governments' recovering lost taxes, revenues, etc., "for a period not to exceed one year" (section 102(a)(2)(F); and (3) adding language covering chronic affects on human health or wildlife.

(4) the exceptions (Sec. 102(c)(2)) to the specified limits on liability (Sec. 102(c)(1)) should be broadened by striking the words "gross" and "within the privity or knowledge" from Sec. 102(c)(2)(A); by substituting "by" for the words "within the privity or knowledge of" in Sec. 102(c)(2)(A).

(5) the language concerning liability adjustments allowing for lower limits for certain facilities (Sec. 102(c)(4)(A)) should either (1) be stricken, or (2) substantially increase the \$8 million lower end of the adjustment range and much clearer guidance should be given as to the limited circumstances under which the \$100,000,000 maximum limit can be lowered.

(6) the provisions concerning natural resources liability, Trustees, measure of damages, rebuttable presumption and use of recovered sums (Sec. 102(d)) need to be modified to reflect the broader scope of liability for natural resources contained in paragraph (3), above.

(7) the provisions concerning uses of the fund for: (a) natural resource claims (Sec. 103(a)) should be modified to reflect the broader scope of liability for natural resources contained in paragraph (3), above; (b) purposes of carrying out Section 311 of the Clean Water Act (Sec. 103(a)(7) along with conforming amendments in Section 203) should be clarified to include the costs of (1) establishing as many "strike team" centers as are deemed necessary (with report language suggesting that all major ports should have such a center), (2) the Coast Guard's purchase of state-of-the-art vessel traffic service (VTS) systems or other port and harbor navigational aids, as deemed necessary, and (3) R&D, as deemed necessary, for more effective cleanup and oil recovery technologies; and (c) a new use of the fund for the payment of contributions to the International Fund established under the 1984 Protocol to the International Fund Convention should be added.

(8) the \$500,000,000 per incident compensation available from the fund (Sec. 103(b)) should be doubled to \$1,000,000,000 per incident, and additional language should be added to the end of that section which would allow the President to waive that cap if necessary (see Appendix B).

(9) a new provision concerning cleanup priorities and ordering of claims' awards should be added to allow for citizen petitions regarding priorities of payment on spills constituting substantial risk to health or the environment, and requests for emergency assistance or removal actions.

(10) the 180-day lag time requirement for presenting a claim to the Fund under Section 103(c)(3)(D) should be reduced to 90 days with an emergency no-interest loan mechanism, as well, pending the running of that 90 days.

(11) the litigation, jurisdiction and venue provisions (Sec. 105) need several additional provisions: (1) citizen suit provisions for injunctive relief similar to those in the Clean Water Act, including qui tam actions by citizens on behalf of the U.S. when the responsible federal official should have acted but has not done so; and (2) a provision providing for the award of costs and attorneys' fees for a successful plaintiff (with a similar provision for attorneys' fees and costs to claimants who successfully apply to the domestic trust fund for compensation).

(12) a new Section 106(b)(3) should be added to read: "nothing in this Act shall prevent a State from imposing or enforcing any requirement respecting financial responsibility."

(13) a new provision to Section 107 legislating studies to determine whether current practices in the insurance industry provide any incentives or disincentives -- such as premium and fee variations -- to encourage industry to use vessels, other equipment and facilities, personnel training and certification, other manning requirements and other measures that will minimize the risk of spills.

(14) the penalty provisions for violations of Section 311 of the Clean Water Act should be revisited, with a view towards substantially increasing those. To that end, the penalty provisions of S. 1223 are a good start. These provisions call for penalties of \$25,000 per day per incident or \$1000 per barrel, whichever is greater, except where "willful negligence" or "willful misconduct" or violations of navigation or safety rules has occurred, the penalty would be no less than \$250,000. It is our opinion that the term "willful" before "negligence" and before "misconduct" should be stricken. Additionally, the \$250,000 minimum penalty should be substantially higher in cases where negligence or misconduct is proven.

(15) a new paragraph should be added to Section 203 which deals with injunctive relief and treble damages. This new paragraph should track the language in H.R. 1465, as amended by the Merchant Marine and Fisheries Committee (Section 102(c)(2)(B)(iii) and Section 203(3) which amends Section 311(e) of the Clean Water Act) or the language in S. 1223. These provisions would give the President substantial new authority in ordering cleanup by the responsible party, and if the responsible party failed to respond to such an order to be liable for significant penalties.

(16) a new provision to Title II should be added: Internal Revenue Code: Subsection 9507(c)(1)(A) of the 1986 Internal Revenue Code as amended by Section 517(a) of the Superfund Amendments and Reauthorization Act of 1986 is amended to read as follows: (ii) section 111(c) of CERCLA (as so in effect), other than paragraph (2) thereof, including under paragraph (3) thereof the costs of a program to investigate and to take enforcement action to recover natural resource damages and"

(17) with respect to the issuance of regulations, adequate provision for public participation in any rulemaking processes under the new domestic law, including provisions for reimbursement of costs to participants (paid for out of the domestic fund), for whom it might otherwise be a hardship to participate, when it can be reasonably expected to promote a full and fair determination of the issues.

(18) a new provision stating the effective date of the Act should be "after March 23, 1989" with legislative report language to clearly indicate that its applicability to the Exxon Valdez spill is intended as a non-punitive reformulation of federal law in relation to that incident.

* * *

APPENDIX B

Below are three suggested provisions to S. 686 which propose two different methods to allow for ratification of the CLC and Fund Protocols and preservation of state authority to enact and enforce their own oil spill liability laws. The provisions call for (1) authority for the President to waive the per incident cap on the domestic Trust Fund; and (2) an ordering of remedies; or (3) a joinder of the Fund. That is, the waiver of the cap provision must be included with either the ordering of remedies provision or the joinder of the fund provision. While we are not wedded to the following language, we are committed to its intent: guaranteeing the preservation of coastal state liability laws and also achieving U.S. ratification of the Protocols without reservation.

1. Waiver of Per Incident Cap

At the end of the reference to the [\$1,000,000,000] per incident compensation available from the domestic Trust Fund (S. 686, Sec. 103(b)), the following additional phrase could be added: "except that where an incident may give rise to compensable claims exceeding \$1,000,000,000, the President shall waive those limits where it is determined such waiver is necessary to ensure full compensation of pollution damage, as defined in the CLC Convention, where such damage exceeds any shipowner's liability under that Convention."

(and)

2. Ordering of Remedies

The following phrase could be added as a new subsection within Sec. 105 of S. 686: "Any action to recover a claim for damages which are compensable under this Act or the Civil Liability Convention or the Fund Convention (as defined in this Act) shall first be brought under this Act or those Conventions in accordance with their respective terms. Actions may be brought under any other law to recover damages for which liability is provided under this Act or those Conventions only if, after applicable remedies provided under this Act and those Conventions, the damages have not been fully compensated."

(or)

3. Joinder of Fund

The following provisions could be included as subsections within Sections 105, 106, or 103 -- as suggested by the end brackets -- supplementing or modifying existing provisions, as appropriate:

(a) Joinder of Fund -- In any action under State law against a person for removal costs or damages in which the liability of the person may exceed the applicable liability limits under the International Convention on Civil Liability for Oil Pollution Damage, 1984 (Civil Liability Convention), assuming that Convention is in force and effect with respect to the United States, the Fund may be joined as a party defendant in the action if within 30 days after the commencement of the action the Fund is provided written notice of the action by that person. [Sec. 105]

B-2

(b) Defenses -- In any action in which the Fund has been joined as party defendant under subsection (a), the Fund may assert all rights and defenses under the applicable State law that are available to the person. [Sec. 105]

(c) Assumption of Excess Liability -- In any final judgment in an action in which the Fund has been joined as a party defendant under subsection (a) and in which the liability of the person for removal costs and damages exceeds the applicable liability limits under the Civil Liability Convention, assuming it is in force and in effect with respect to the United States, the Fund is deemed to be the liable party with respect to such excess liability and shall assume all rights, defenses, and responsibility under State law for such excess liability. [Sec. 105]

(d) Relationship to Other Federal Law -- This Act supersedes any other inconsistent Federal law governing liability or compensation for removal costs or damages. [Sec. 105]

(e) Relationship to State Law -- Nothing in this Act shall be construed or interpreted as preempting any State from establishing under State law additional liability or requirements with respect to removal costs or damages. [Sec. 106]

(f) Uses of the Fund -- [the Fund shall be available for] the payment of removal costs and damages under State law for which the Fund is liable pursuant to Section [105/106]. [Sec. 103]

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August 2, 1989

Honorable George Mitchell, Chair
Committee on Environment and Public Works
United States Senate
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Mitchell:

Senate Bill 686

These comments supporting oil spill liability legislation are provided to the subcommittee pursuant to the Attorney General's independent constitutional, statutory and common law authority to represent the People of the State of California and to protect the resources of the State. We request that these comments be included in the record of the July 21, 1989, hearing conducted by the Subcommittee on Environmental Protection concerning Senate Bill 686.

We are writing to state our strong support for comprehensive oil spill liability legislation. The *Exxon Valdez* disaster has demonstrated to the Nation the need for oil spill liability legislation that will insure that those responsible for oil spills are also responsible for removing the oil, restoring the environment and making whole those injured by the spill. The *Exxon Valdez* spill has shown that in the event of a major oil spill, the damage will be long lasting and severe and the costs will be high. Not only will the ocean and coastal environment be despoiled, but those citizens who make their living from those environments, e.g., those employed in the fishing or tourism industries, will also suffer serious losses.

While we believe that S. 686 in its present form is superior to legislation pending in the House of Representatives (H.R. 1465), S. 686 can be improved. In particular, many of the concerns which we have about S. 686 are addressed by S. 1223 recently introduced by Senator Lieberman and co-sponsored by Senators Cranston, Chafee, Durenberger and Reid.

Honorable George Mitchell
Page 2

In general, there are several concerns which oil spill liability legislation must address. First, the federal oil spill liability laws should not preempt state law. While S. 686 makes clear that state law would not be preempted, H.R. 1465, as reported out of the Merchant Marine and Fisheries Committee, would preempt state liability laws, would limit the ability of states to use their own oil spill contingency funds, would prohibit states requiring proof of financial responsibility beyond that contained in the federal statute, and would prevent the use of state courts as an avenue to obtain compensation. As a general matter, we cannot support federal legislation which has such an adverse effect on state law. The express non-preemption provision found in S. 686 provides one basis for our support for this bill.

We wish to note that our concerns about preemption are not based on speculation about the effects of preemption. Recently, we have been involved in negotiations with Shell in an attempt to reach a settlement on the amount of damages to be paid by Shell for the spill at its Martinez, California, refinery. Settlement negotiations are proceeding, and we presently are optimistic about reaching agreement. Among the reasons that the negotiations have progressed as far as they have was Shell's knowledge of our ability to use the state courts to assess liability under California state law. Under California law, there is no limit on the liability of a party responsible for an oil spill. Under H.R. 1465, we could neither use the state courts nor enforce state liability laws, and this would have created an unneeded obstacle to pursuing settlement.

Moreover, Congress must recognize that it is the states which react first to oil spills. As such, they are our first line of defense and often have interests both different from and greater than the federal government in cleaning up the oil and restoring the environment. The states should not be forced to rely on the federal agencies and federal courts to insure that there is complete response to and compensation for an oil spill. Thus, under H.R. 1465, California would not be able to use the provisions found in state law which allow for rapid administrative abatement and cleanup orders. These provisions, e.g., California Water Code § 13304 and California Fish and Game Code § 5655, insure that the state can react rapidly and responsibly to an oil spill.

Honorable George Mitchell
Page 3

Second, the liability of a party responsible for a spill must either be unlimited or high enough to insure that the public does not end up paying the costs for removal of spilled oil and restoration of the environment. Additionally, high or unlimited liability will provide an important incentive to the industry to take steps to prevent oil spills from occurring.

H.R. 1465 limits the liability of a responsible party to \$60 million for a tanker spill. In light of Exxon's recent testimony that it has already spent \$675 million addressing the spill in Prince William Sound and that total cleanup costs may exceed \$1.3 billion, the liability limit in H.R. 1465 is clearly too low. Under the approach used in S. 686, Exxon's liability would have been limited to about \$107 million. In contrast, S. 1223 makes a responsible party liable for actual removal costs and damages. Given the huge costs associated with a major oil spill, the approach found in S. 1223 is clearly preferable.

H.R. 1465 limits the liability of a responsible party to \$75 million for a spill from any facility, including OCS facilities. Because this figure is clearly too low, we had hoped that the Senate would not limit liability. Prior to its mark up, S. 686 provided that a party responsible for a spill from an OCS facility was liable for the total of all removal costs plus \$75 million. In mark up, Senator Breaux offered an amendment which placed a total cap on liability of \$100 million. Not only is this lower liability than is provided under current law (i.e., actual removal and clean up costs plus up to \$35 million in damages), but the Exxon Valdez spill, and the cost of cleaning it up, demonstrates that \$100 million is simply too low. This is particularly true for California. In California, OCS development is generally within 20 miles of shore. If a platform spill of 10 million gallons, or as large as that in Prince William Sound, occurred offshore California, it would be virtually certain to hit shore, and the cost of removing the oil and restoring the area would be just as expensive as it has been in Prince William Sound. In our view, the language limiting liability for an OCS spill should be removed from S. 686. The best course would be for there to be no liability limit at all. Failing that, we urge that the language originally included in S. 686 be reinstated.

Third, the oil spill fund must be available to insure that all those injured by a spill are fully compensated. S. 686 provides that the fund is available up to a maximum of \$500 million per incident. As noted above, however, Exxon says that it has already spent \$600 million on the Valdez spill. H.R. 1465 now

Honorable George Mitchell
Page 4

provides that the fund is available up to a maximum of \$1 billion, and the administration proposal (H.R. 2325) specified that its limit of \$500 million could be waived by the President if needed to cover the costs of a major spill. We recommend that the Senate consider either raising the maximum which may be paid from the fund or creating a mechanism which will insure that in the event of a catastrophic spill the fund will be available for the very high removal and restoration costs which will be incurred. It is especially important for private claimants that the amount which the fund can pay for a single incident be sufficiently high. It is obviously preferable for the fund to be available to reimburse such claimants rather than having to face the possibility of litigating individually against a major corporation.

Fourth, as provided in S. 1223, the legislation should define "responsible party" to include the owner of the oil, and not just the owner or operator of the vessel or facility. We believe that this is very important to an effective liability law. If the owner of the oil is a responsible party, then the need to ratify the international protocols on liability and for the international oil spill fund is greatly reduced if not eliminated. It is our expectation that virtually all of the oil which is transported to the United States in foreign owned vessels is already owned by an American company. If this is not the case, Congress could require that such oil be owned by an American company. Then, even if there were a spill from a foreign owned vessel, and if there were no means to assert jurisdiction over the owner or operator of the vessel, the United States could assert jurisdiction over the owner of the oil and assess liability against that entity.

Fifth, we are concerned about the manner in which the dates for filing actions for removal costs and damages are defined. In H.R. 1465, actions for damages must be filed within three years after the loss and its connection with the spill were "reasonably discoverable with the exercise of due care...." This use of what is effectively a negligence standard for discovering the connection between a loss and a spill will pose a significant hurdle both for governments and for private claimants trying to recover their losses. S. 686 uses a standard much more similar to that added to CERCLA by the 1986 Superfund amendments, and while it is not without ambiguity, it is preferable to the standard found in H.R. 1465.

Honorable George Mitchell
Page 5

Both S. 686 and H.R. 1465 specify, however, that an action to recover removal costs must be commenced within three years of the completion of the removal. This poses serious questions of when removal has been completed and who determines that removal is completed. In California, under our state superfund law, the date of accrual of an action to recover removal costs is the date on which the Department of Health Services certifies that removal is complete. We recommend that S. 686 be amended to include a similar provision, e.g., the federal and state trustees will certify the date of completion of removal and that date will trigger the time period for commencing actions to recover removal costs.

Finally, we wish to note an area which has not received the same level of attention as oil spill liability, i.e., oil spill prevention and response. The Exxon Valdez spill demonstrated that once a major spill occurs, it is extremely difficult if not impossible to contain the spill and clean it up. Indeed, international experts on oil spill cleanup estimate that only 10% of the oil spilled in an accident can be recovered. This very limited ability to contain and cleanup spills makes all the more important our ability to prevent spills. To this end, Congress must explore techniques which both prevent spills, e.g., requiring the use of vessel traffic separation lanes and improving radar tracking of vessels, and minimize the severity of spills, e.g., requiring double hulls on all tankers serving our ports. Section 107 of S. 686 requires that the President conduct a study into just such techniques, and this is another reason we support the legislation.

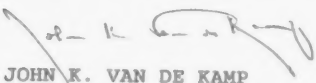
In light of its demonstrated inability to cleanup a major oil spill, Congress must force the oil industry to improve its response capabilities. Clearly, research must be conducted to improve our response to oil spills and to minimize the damage caused by a major spill. Additionally, under current law, the party responsible for a spill is also responsible for the cleanup. The federal government steps in only if it determines that the responsible party is not capable of conducting the cleanup operations. While it is obviously proper for the party responsible for the spill to pay for its cleanup, it is not appropriate for that party to control the cleanup. Instead, such control should vest in the state and federal governments because

Honorable George Mitchell
Page 6

they can best determine in an objective fashion those steps which must be taken. While oil spill liability legislation is of great importance, we also urge the Subcommittee to turn a part of its attention also to oil spill prevention and response.

We appreciate this opportunity to express our views to you. If there is any further assistance which this office can provide, please contact Deputy Attorney General John A. Saurenman at (213) 736-2046.

Sincerely,



JOHN K. VAN DE KAMP
Attorney General

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cc: Senator Alan Cranston
Senator Pete Wilson
Senator Max Baucus
Senator Joseph Lieberman
Representative George Miller
Representative Glenn Anderson
Representative Norman Y. Mineta
Representative Douglas H. Bosco
Representative Mel Levine
Representative Robert J. Lagomarsino
Representative Norman D. Shumway
Representative Ron Packard
Representative Wally Herger
Representative Elton Gallegly
Representative C. Christopher Cox
Coastal States Organization
National Association of Attorneys General

S. 686

IN THE SENATE OF THE UNITED STATES

Mr. MITCHELL (for himself, Mr. BAUCUS, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To consolidate and improve Federal laws providing compensation and establishing liability for oilspills.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 *That this Act may be cited as the "Oil Pollution Liability and*
4 *Compensation Act of 1989".*

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

DEFINITIONS

SEC. 101. For the purposes of this Act—

2

1 (1) the terms "vessel", "public vessel", "owner or
2 operator", "remove" or "removal", "contiguous
3 zone", "onshore facility", "offshore facility", and
4 "barrel" shall have the meaning provided in section
5 311(a) of the Clean Water Act;

6 (2) the terms "person", "navigable waters", and
7 "territorial seas" shall have the meaning provided in
8 section 502 of the Clean Water Act;

9 (3) the term "act of God" means an unanticipated
10 grave natural disaster or other natural phenomenon of
11 an exceptional, inevitable, and irresistible character the
12 effects of which could not have been prevented or
13 avoided by the exercise of due care or foresight;

14 (4) the term "claim" means a request, made in
15 writing for a sum certain, for compensation for dam-
16 ages or removal costs resulting from a discharge of oil;

17 (5) the term "claimant" means any person who
18 presents a claim for compensation under this Act;

19 (6) the term "damages" means damages for eco-
20 nomic loss or the loss of or injury to natural resources
21 as specified in section 102(a) of this Act;

22 (7) the term "deepwater port facility" means an
23 offshore facility which is or was licensed under the
24 Deepwater Port Act of 1974;

3

1 (8) the term "discharge" means any emission, in-
2 tentional or unintentional, into the environment, and
3 includes, but is not limited to, spilling, leaking, pump-
4 ing, pouring, emitting, emptying, or dumping;

5 (9) the term "environment" means the navigable
6 waters, the waters of the contiguous zone, the ocean
7 waters of which the natural resources are under the
8 exclusive management authority of the United States
9 under the Magnuson Fishery Conservation and Man-
10 agement Act, adjoining shorelines, and the ambient air
11 above such waters and shorelines;

12 (10) the term "foreign offshore unit" means a
13 structure or group of structures which is located, in
14 whole or in part, in the territorial sea or on the conti-
15 nental shelf of a foreign country and is or was used for
16 one or more of the following purposes: exploring for,
17 drilling for, producing, storing, handling, transferring,
18 processing, or transporting oil produced from the
19 seabed beneath the foreign country's territorial sea or
20 from the foreign country's continental shelf;

21 (11) the term "Fund" means the Oil Spill Com-
22 pensation Fund, hereby established under this Act;

23 (12) the term "guarantor" means any person,
24 other than the owner or operator, who provides evi-
25 dence of financial responsibility for an owner or opera-

1 tor under this Act or section 311(p) of the Clean
2 Water Act;

3 (13) the term "lessee" means a person holding a
4 leasehold interest in an oil or gas lease on submerged
5 lands of the Outer Continental Shelf, granted or main-
6 tained under the Outer Continental Shelf Lands Act;

7 (14) the term "liable" or "liability" under this
8 Act shall be construed to be the standard of liability
9 which obtains under section 311 of the Clean Water
10 Act;

11 (15) the term "mobile offshore drilling unit"
12 means a vessel capable of use as an Outer Continental
13 Shelf facility to drill for oil;

14 (16) the term "natural resources" includes land,
15 fish, wildlife, biota, air, water, ground water, drinking
16 water supplies, and other such resources belonging to,
17 managed by, held in trust by, appertaining to, or other-
18 wise controlled by the United States (including the re-
19 sources of the fishery conservation zone established by
20 the Magnuson Fishery Conservation and Management
21 Act), any State or local government, or any foreign
22 government;

23 (17) the term "oil" means petroleum, including
24 crude oil or any fraction or residue therefrom;

5

1 (18) the term "Outer Continental Shelf facility"
2 means an offshore facility which is located, in whole or
3 in part, on the Outer Continental Shelf and is or was
4 used for one or more of the following purposes: explor-
5 ing for, drilling for, producing, storing, handling, trans-
6 ferring, processing, or transporting oil produced from
7 the Outer Continental Shelf;

8 (19) the term "owner or operator" means—

9 (A) with respect to an Outer Continental
10 Shelf facility other than a pipeline or mobile off-
11 shore drilling unit, the lessee or permittee of the
12 area in which the facility is located, or the holder
13 of a right of use and easement granted under the
14 Outer Continental Shelf Lands Act for the area in
15 which the facility is located (where the holder is a
16 different person than the lessee or permittee);

17 (B) with respect to a mobile offshore drilling
18 unit being used as an Outer Continental Shelf fa-
19 cility, from which oil is discharged on or above
20 the surface of the water (or which posed a sub-
21 stantial threat of such a discharge), the owner or
22 operator of the unit, and such unit shall be
23 deemed to be a tanker;

1 (C) with respect to a mobile offshore drilling
2 unit being used as an Outer Continental Shelf
3 facility—

4 (i) from which oil is discharged on or
5 above the surface of the water (or which
6 posed a substantial threat of such a dis-
7 charge), to the extent removal costs or dam-
8 ages exceed the limitation specified in section
9 102(c)(1)(A), or

10 (ii) from which oil is discharged below
11 the surface of the water (or which posed a
12 substantial threat of such a discharge),
13 the lessee or permittee of the area in which the
14 unit is located, or the holder of a right of use and
15 easement granted under the Outer Continental
16 Shelf Lands Act for the area in which the unit is
17 located (where the holder is a different person
18 than the lessee or permittee);

19 (20) the term "permittee" means a person holding
20 an authorization, license, or permit for geological ex-
21 ploration issued under section 11 of the Outer Conti-
22 nental Shelf Lands Act;

23 (21) the term "removal costs" means the costs of
24 removal taken after a discharge of oil has occurred or
25 where there was a substantial threat of a discharge of

1 oil, to prevent, minimize, or mitigate oil pollution from
2 that incident, including all costs of completing removal
3 as determined under section 106(d);

4 (22) the term "tanker" means a vessel construct-
5 ed or adapted for the carriage of oil in bulk or in com-
6 mercial quantities as cargo; and

7 (23) the terms "United States" and "State" mean
8 the several States of the United States, the District of
9 Columbia, the Commonwealth of Puerto Rico, Guam,
10 American Samoa, the United States Virgin Islands, the
11 Commonwealth of the Northern Marianas, and any
12 other territory or possession over which the United
13 States has jurisdiction.

14 LIABILITY

15 SEC. 102. (a) Notwithstanding any other provision or
16 rule of law, and subject only to the defenses set forth in sub-
17 section (b) of this section, the owner or operator of a vessel or
18 an onshore or offshore facility from which oil is discharged, or
19 which posed the threat of a discharge which causes the incur-
20 rence of removal costs, shall be liable for—

21 (1)(A) all removal costs incurred by the United
22 States Government or a State under subsection (c), (d),
23 (e), (f)(4), or (l) of section 311 of the Clean Water Act
24 or under the Intervention on the High Seas or section
25 18 of the Deepwater Port Act of 1974; and

8

1 (B) any removal costs incurred by any person, in-
2 cluding, but not limited to, any State; and

3 (2) all damages for economic loss or loss of natu-
4 ral resources resulting from such a discharge, includ-
5 ing—

6 (A) any injury to, destruction of, or loss of
7 any real or personal property;

8 (B) any loss of use of real or personal
9 property;

10 (C) any injury to, destruction of, or loss of
11 natural resources, including the reasonable costs
12 of assessing such injury, destruction, or loss;

13 (D) any loss of use, including loss of subsist-
14 ence use, of any natural resources, without regard
15 to the ownership or management of such re-
16 sources;

17 (E) any loss of income or profits or impair-
18 ment of earning capacity resulting from injury to
19 or destruction of real or personal property or nat-
20 ural resources, without regard to the ownership of
21 such property or resources; and

22 (F) any direct or indirect loss of tax, royalty,
23 rental, or net profits share revenue by the Federal
24 Government or any State or political subdivision
25 thereof, for a period of not to exceed one year.

9

1 (b)(1) There shall be no liability under subsection (a) of
2 this section for a person otherwise liable who can establish by
3 a preponderance of the evidence that the discharge or threat
4 of discharge of oil and the damages resulting therefrom were
5 caused solely by—

6 (A) an act of God;

7 (B) an act of war;

8 (C) an act or omission of a third party other than
9 an employee or agent of the defendant, or than one
10 whose act or omission occurs in connection with a con-
11 tractual relationship, existing directly or indirectly,
12 with the defendant (except where the sole contractual
13 arrangement arises from a published tariff and accept-
14 ance for carriage by a common carrier by rail), if the
15 defendant establishes by a preponderance of the evi-
16 dence that (i) the defendant exercised due care with re-
17 spect to the oil concerned, taking into consideration the
18 characteristics of such oil, in light of all relevant facts
19 and circumstances, and (ii) the defendant took precau-
20 tions against foreseeable acts or omissions of any such
21 third party and the consequences that could foreseeably
22 result from such acts or omissions; or

23 (D) any combination of the foregoing paragraphs.

24 (2) In any case where the owner or operator of a vessel
25 or an onshore or offshore facility can establish by a prepon-

1 derance of the evidence that a discharge and the damages
2 resulting therefrom were caused solely by an act or omission
3 of a third party in accordance with paragraph (1)(C) (or solely
4 by such an act or omission in combination with an act of God
5 or an act of war), such third party shall be liable under this
6 section as if such third party were the owner or operator of a
7 vessel or onshore or offshore facility from which the dis-
8 charge actually occurred. Where the owner or operator of a
9 tanker or an onshore or offshore facility which handles or
10 stores oil in bulk or commercial quantities, from which oil is
11 discharged, alleges that such discharge was caused solely by
12 an act or omission of a third party, such owner or operator
13 shall promptly pay to the United States Government, and
14 any other claimant, the costs of removal or damages claimed
15 and shall be entitled by subrogation to all rights of the United
16 States Government or other claimant to recover such costs of
17 removal or damages from such third party under this sub-
18 section.

19 (c)(1) The liability of an owner or operator of a vessel or
20 an onshore or offshore facility for damages and removal costs
21 under this section for each discharge or incident shall not
22 exceed—

23 (A) \$500 per gross ton or \$10,000,000, whichever
24 er is greater, of any tanker carrying oil in bulk or in

1 commercial quantities as cargo, including any such
2 barge operating in the navigable waters;

3 (B) \$300 per gross ton or \$500,000, whichever is
4 greater, of any other vessel;

5 (C) the total of all removal costs under subsection
6 (a)(1) of this section plus \$75,000,000 for any Outer
7 Continental Shelf facility;

8 (D) \$100,000,000 for any deepwater port facility
9 (including the liability of the licensee for a discharge
10 from any vessel moored at such port, in any case
11 where \$100,000,000 exceeds \$500 per gross ton of
12 such vessel); or

13 (E) \$100,000,000 for any other onshore or off-
14 shore facility.

15 The liability of an owner or operator under this section for
16 interest (including prejudgment interest) shall not be subject
17 to the limitations of this paragraph.

18 (2) Notwithstanding the limitations of paragraph (1) of
19 this subsection, the liability of the owner or operator of a
20 vessel or an onshore or offshore facility under subsection (a)
21 of this section shall be the full and total damages and removal
22 costs not offset by any removal costs incurred on behalf of
23 such owner or operator, if (A) the discharge of oil was the
24 result of willful misconduct or gross negligence within the
25 privity or knowledge of the owner or operator or of a viola-

tion (within the privity or knowledge of the owner or operator) of applicable safety, construction, or operating standards or regulations; or (E) the owner or operator fails or refuses to report the discharge where required by law or to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities or to provide removal action upon order of a responsible official. For the purpose of this paragraph, applicable standards or regulations with respect to a vessel shall be those adopted or promulgated by a Federal agency.

(3) Notwithstanding the limitations of paragraph (1) of this subsection or the defenses of subsection (b) of this section, all removal costs incurred by the United States Government or any State of local official or agency in connection with a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(4)(A) The President is authorized to establish by regulation, with respect to any class or category of onshore or offshore facility subject to paragraph (1) (D) or (E) of this subsection, a maximum limit of liability under this section of less than \$100,000,000, but not less than \$8,000,000, taking into account the size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of dis-

1 charges, and other factors relevant to risks posed by the class
2 or category of facility.

3 (B) The President shall, by regulation, not less often
4 than every three years, adjust the limits of liability specified
5 in paragraph (1) of this subsection to reflect significant in-
6 creases in the Consumer Price Index.

7 (d)(1) In the case of an injury to, destruction of, or loss
8 of natural resources under subsection (a)(2)(C) of this section,
9 liability shall be (A) to the United States Government for
10 natural resources belonging to, managed by, controlled by, or
11 appertaining to the United States, and (B) to any State for
12 natural resources within the State or belonging to, managed
13 by, controlled by, or appertaining to such State, and (C)
14 where subsection (e) of this section applies, to the govern-
15 ment of a foreign country for natural resources belonging to,
16 managed by, controlled by, or appertaining to such govern-
17 ment. The President, or the authorized representative of any
18 State or of the foreign government, shall act on behalf of the
19 public as trustee of such natural resources to recover for such
20 damages. Sums recovered by the United States Government
21 as trustee under this subsection shall be retained by the
22 trustee, without further appropriation, for use only to restore,
23 replace, or acquire the equivalent of such natural resources.
24 Sums recovered by a State as trustee under this subsection
25 shall be available for use only to restore, replace, or acquire

1 the equivalent of such natural resources by the State. The
2 measure of damages in any action under subsection (a)(2)(C)
3 shall not be limited by the sums which can be used to restore
4 or replace such resources. There shall be no double recovery
5 under this Act for natural resource damages, including the
6 costs of damage assessment or restoration, rehabilitation, or
7 acquisition for the same discharge and natural resource.

8 (2)(A) The President shall designate the Federal officials
9 who shall act on behalf of the public as trustees for natural
10 resources under this Act. Such officials shall assess damages
11 for injury to, destruction of, or loss of natural resources for
12 purposes of this Act for those resources under their trustee-
13 ship and may, upon request of and reimbursement from a
14 State and at the Federal officials discretion, assess damages
15 for those natural resources under the State's trusteeship.

16 (B) The Governor of each State shall designate State
17 officials who may act on behalf of the public as trustee for
18 natural resources under this Act and shall notify the Presi-
19 dent of such designations. Such State officials shall assess
20 damages to natural resources for the purposes of this Act for
21 those natural resources under their trusteeship.

22 (C) Any determination or assessment of damages to nat-
23 ural resources for the purposes of this Act made by a Federal
24 or State trustee in accordance with the regulations promul-
25 gated under paragraph (3) of this subsection shall have the

1 force and effect of a rebuttable presumption on behalf of the
2 trustee in any administrative or judicial proceeding under this
3 Act.

4 (3)(A) The President, acting through the Administrator
5 of the National Oceanic and Atmospheric Administration, in
6 consultation with the Administrator of the Environmental
7 Protection Agency, the Director of the Fish and Wildlife
8 Service, and the heads of other affected agencies, not later
9 than two years after the enactment of this Act, shall promul-
10 gate regulations for the assessment of damages for injury to,
11 destruction of, or loss of natural resources resulting from a
12 discharge of oil for the purpose of this Act.

13 (B) Such regulations shall specify (i) standard proce-
14 dures for simplified assessments requiring minimal field ob-
15 servation, including establishing measures of damages based
16 on units of discharge or units of affected areas, where dam-
17 ages equal the costs of restoration, replacement, or acquisi-
18 tion of equivalent resources, plus demonstrated additional lost
19 use value or other damages beyond such costs, and (ii) alter-
20 native protocols for conducting assessments in individual
21 cases to determine the type and extent of short and long term
22 injury, destruction, or loss. Such regulations shall identify the
23 best available procedures to determine such damages, includ-
24 ing both direct and indirect injury, destruction, or loss, and
25 shall take into consideration factors including, but not limited

1 to, replacement value, use value, and ability of the ecosystem
2 or resource to recover.

3 (C) Such regulations shall be reviewed and revised as
4 appropriate every two years.

5 (e)(1) The recovery of removal costs and damages by (A)
6 persons residing in a foreign country, (B) the government of a
7 foreign country, or (C) any agency or political subdivision of
8 a foreign country, under this Act, shall be exclusively in ac-
9 cordance with this subsection.

10 (2) A claimant under this subsection must demonstrate
11 that the claimant has not been otherwise compensated for
12 incurred removal costs or damages. Except with respect to
13 paragraph (3)(D) of this subsection, a claimant under this
14 subsection must demonstrate (A) that recovery is authorized
15 by a treaty or executive agreement between the United
16 States and the claimant's country, or (B) that the Secretary
17 of State, in consultation with the Attorney General and other
18 appropriate officials, has certified that the claimant's country
19 provides a comparable remedy for United States claimants.

20 (3) Where a discharge, or substantial threat of a dis-
21 charge of oil in or on the territorial sea, internal waters, or
22 adjacent shoreline of a foreign country occurs, claims for re-
23 moval costs and damages may be made under this subsection
24 if the removal costs or damages resulted from a discharge of,
25 or substantial threat of a discharge, of oil from—

1 (A) an Outer Continental Shelf facility or a deep-
2 water port facility,

3 (B) a vessel occurring in the navigable waters of
4 the United States,

5 (C) a vessel carrying oil as cargo between two
6 ports subject to the jurisdiction of the United States; or

7 (D) a tanker that received oil at the terminal of
8 the pipeline constructed under the Trans-Alaska Pipe-
9 line Authorization Act for transportation to a port in
10 the United States, the discharge or threat having oc-
11 curred prior to delivery to that port.

12 (4) This subsection shall apply only in the case of dis-
13 charges of oil occurring after the enactment of this Act.

14 (f)(1) No indemnification, hold harmless, or similar
15 agreement or conveyance shall be effective to transfer from
16 the owner or operator of any vessel or onshore or offshore
17 facility or from any person who may be liable for a discharge
18 or threat of discharge under this section, to any other person
19 the liability imposed under this section. Nothing in this sub-
20 section shall bar any agreement to insure, hold harmless, or
21 indemnify a party to such agreement for any liability under
22 this section.

23 (2) Nothing in this Act, including the provisions of para-
24 graph (1) of this subsection, shall bar a cause of action that
25 an owner or operator subject to liability under this section, or

1 a guarantor, has or would have, by reason of subrogation or
2 otherwise against any person.

3 (g) The owner or operator of a vessel shall be liable in
4 accordance with this section and section 311 of the Clean
5 Water Act, under maritime tort law, and as provided in sec-
6 tion 106 of this Act, notwithstanding any provision of the Act
7 of March 3, 1851 (46 U.S.C. 183), or the absence of any
8 physical damage to the proprietary interest of the claimant.

9

USES OF FUND

10 SEC. 103. (a) The President shall use the money in the
11 Fund for the following purposes:

12 (1) all removal costs or other costs of carrying out
13 the purposes of subsections (c), (d), (i), and (l) of section
14 311 of the Clean Water Act, sections 5 and 7 of the
15 Intervention on the High Seas Act, and section 18 of
16 the Deepwater Port Act, with respect to discharges, or
17 substantial threats of discharges, of oil (as the term
18 "oil" is defined in each respective Act);

19 (2) payment of any claim for removal costs or
20 damages—

21 (A) in excess of the amount for which the
22 owner or operator of the vessel or onshore or off-
23 shore facility from which oil is discharged is liable
24 under section 102 of this Act;

25 (B) where the source of the discharge of oil
26 is not known or cannot be identified; or

1 (C) in any case where the claim has not been
2 satisfied in accordance with subsection (c) of this
3 section;

4 (3) payment of any claim for removal costs and
5 damages that have resulted from the discharge, or sub-
6 stantial threat of a discharge, of oil from a foreign off-
7 shore unit;

8 (4)(A) payment of costs incurred by any State in
9 responding to a discharge, or substantial threat of a
10 discharge, of oil into the navigable waters or adjoining
11 shorelines from a vessel, an onshore facility, an off-
12 shore facility, or a foreign offshore unit, as provided in
13 subsection (d) of this section;

14 (B) reimbursement to any State for the payment
15 of any claims for removal costs or damages payable
16 under this Act which such State has paid with funds
17 under the control of such State, including payment pur-
18 suant to a delegation under subsection (c) of this
19 section;

20 (5) the costs of assessing both short-term and
21 long-term injury to, destruction of, or loss of any natu-
22 ral resources resulting from a discharge of oil;

23 (6) the costs of Federal or State efforts in the res-
24 toration, rehabilitation, or replacement or acquiring the

1 equivalent of any natural resources injured, destroyed,
2 or lost as a result of any discharge of oil;

3 (7) subject to such amounts as are provided in ap-
4 propriation Acts, the costs of providing equipment and
5 similar overhead, related to the purposes of this Act
6 and section 311 of the Clean Water Act, and of estab-
7 lishing and maintaining damage assessment capability,
8 for any Federal agency involved in strike forces, emer-
9 gency task forces, or other response teams;

10 (8) the costs of a program to identify, investigate,
11 and take enforcement and abatement action against
12 discharges of oil, including the provisions of section
13 311(j)(1) (C) and (D) of the Clean Water Act; and

14 (9) all administrative and personnel costs of ad-
15 ministering the Fund and this Act.

16 (b) The maximum amount which may be paid from the
17 Fund with respect to any single discharge or incident shall
18 not exceed \$500,000,000.

19 (c)(1) The President is authorized to promulgate regula-
20 tions designating one or more Federal officials who may obli-
21 gate money in the Fund in accordance with subsection (a) of
22 this section or portions thereof. The President is also author-
23 ized to delegate authority to obligate money in the Fund or
24 to settle claims to officials of a State with an adequate pro-

1 gram operating under a cooperative agreement with the Fed-
2 eral Government.

3 (2) The President is authorized to delegate the adminis-
4 tration of his duties and authorities under this Act to the
5 heads of those Federal departments, agencies, and instrumen-
6 talities which the President determines appropriate.

7 (3)(A) The President shall promulgate, and may from
8 time to time amend, regulations for the presentation, filing,
9 processing, settlement, and adjudication of claims for removal
10 costs or damages resulting from the discharge, or substantial
11 threat of a discharge, of oil under this Act.

12 (B) Whenever the President receives information from
13 any person alleging that a person has incurred removal costs
14 or damages resulting from the discharge, or substantial threat
15 of a discharge, of oil respecting which the owner or operator
16 of a vessel or onshore or offshore facility is or may be liable
17 under section 102 of this Act, the President shall notify the
18 owner, operator, or guarantor or such vessel or facility of
19 that allegation. Such owner or operator or guarantor may,
20 within five days after receiving the notification or presenta-
21 tion of any claim by a claimant, deny the allegation, or deny
22 liability for removal costs and damages for any of the reasons
23 set forth in subsection (b) of section 102 of this Act.

1 (C) The owner or operator of any vessel or onshore or
2 offshore facility from which oil has been discharged shall pro-
3 vide notice to all potentially injured parties.

4 (D) No claims may be asserted against the Fund pursu-
5 ant to subsection (a) unless such claim is presented in the first
6 instance to the owner or operator or guarantor of the vessel
7 or onshore or offshore facility from which oil has been dis-
8 charged, if known to the claimant, and to any other person
9 known to the claimant who may be liable under section 102.
10 In any case where the claim has not been satisfied within one
11 hundred eighty days of presentation in accordance with this
12 subsection, the claimant may present the claim to the Fund
13 for payment. No claim against the Fund may be approved or
14 certified during the pendency of an action by the claimant in
15 court to recover costs which are the subject of the claim.

16 (d) The Governor of each State, or any appropriate
17 State official designated by the Governor, is authorized to
18 obligate the Fund for the payment of removal costs in an
19 amount not to exceed \$250,000 per discharge or substantial
20 threat of discharge of oil, for the purpose of immediate re-
21 sponse, subject only to the requirement that the President be
22 notified within twenty-four hours of any such obligation
23 under the authority of this sentence. In addition, the Presi-
24 dent shall enter into an agreement with the Governor of any
25 interested State to provide a procedure by which the Gover-

1 nor or designated State official may undertake additional re-
2 moval action or obligate the Fund for the additional payment
3 of removal costs for response to a particular discharge or
4 substantial threat of discharge, subject to such terms and
5 conditions as may be agreed upon. Payments under subsec-
6 tion (a)(4)(A) of this section, other than as authorized by the
7 first sentence of this subsection, shall be made in accordance
8 with such agreements. The President shall, not later than six
9 months after the enactment of this Act, publish proposed reg-
10 ulations further establishing how the authority of this subsec-
11 tion to obligate the Fund or enter into agreements is to be
12 exercised, and, not later than three months after the close of
13 the comment period on such proposed regulations, shall pro-
14 mulgate such regulations.

15 (e)(1) Payment of any claim by the Fund under this sec-
16 tion shall be subject to the United States Government acquir-
17 ing by subrogation all rights of the claimant to recover the
18 removal costs or damages from the responsible party.

19 (2) Any person, including the Fund, who pays compen-
20 sation pursuant to this Act to any claimant for costs or dam-
21 ages shall be subrogated to all rights, claims, and causes of
22 action for those costs and damages that the claimant has
23 under this Act or under any other law.

24 (3) Upon request of the President, the Attorney General
25 shall commence an action on behalf of the Fund to recover

1 any compensation paid by the Fund to any claimant pursuant
2 to this Act, and, without regard to any limitation of liability
3 with respect to an owner or operator under section 102(c), all
4 costs incurred by the Fund by reason of the claim, including
5 interest (including prejudgment interest), administrative and
6 adjudicative costs, and attorney's fees. Such an action may
7 be commenced against any owner or operator or (subject to
8 section 104(e)) guarantor, or against any other person who is
9 liable, pursuant to any law, to the compensated claimant or
10 to the Fund, for the cost or damages for which the compensa-
11 tion was paid. Such an action shall be commenced against
12 the responsible foreign government or other responsible party
13 to recover any removal costs or damages paid from the Fund
14 as the result of the discharge, or substantial threat of dis-
15 charge, of oil from a foreign offshore unit.

16 (f) The Fund shall not be available to pay any claim for
17 costs or damages to the extent the discharge or the damages
18 had been caused by the gross negligence or willful miscon-
19 duct of that particular claimant.

20 (g) The Comptroller General shall provide an audit
21 review team to audit all payments, obligations, reimburse-
22 ments, or other uses of the Fund, to assure that the Fund is
23 being properly administered and that claims are being appro-
24 priately and expeditiously considered. The Comptroller Gen-
25 eral shall submit to the Congress an interim report one year

1 after the establishment of the Fund. The Comptroller General
2 shall thereafter provide such auditing of the Fund as is
3 appropriate. Each Federal agency shall cooperate with the
4 Comptroller General in carrying out this subsection.

5 (h)(1) No claim may be presented under this section for
6 recovery of removal costs after the date six years after the
7 date of completion of all removal action.

8 (2) No claim may be presented under this section for
9 recovery of damages unless the claim is presented within
10 three years after the date of the discovery of the loss and its
11 connection with the release in question, or in the case of
12 damages under section 102(a)(2)(C), if later, the date on
13 which final regulations are promulgated under section
14 102(d)(3) of this Act.

15 (3) The time limitations contained herein shall not begin
16 to run—

17 (A) against a minor until the earlier of the date
18 when such minor reaches eighteen years of age or the
19 date on which a legal representative is duly appointed
20 for the minor, or

21 (B) against an incompetent person until the earlier
22 of the date on which such incompetent's incompetency
23 ends or the date on which a legal representative is
24 duly appointed for such incompetent.

1 (i) Where the President has paid out of the Fund for any
2 removal costs or any costs specified under subsection (a) (5)
3 or (6), no other claim may be paid out of the Fund for the
4 same costs.

5 (j) Except in a situation requiring action to avoid an
6 irreversible loss of natural resources or to prevent or reduce
7 any continuing danger to natural resources or similar need
8 for emergency action, funds may not be used under this Act
9 for the restoration, rehabilitation, or replacement or acqui-
10 sition of the equivalent of any natural resources until a plan for
11 the use of such funds for such purposes has been developed
12 and adopted by affected Federal agencies and the Governor
13 or Governors of any State having sustained damage to natu-
14 ral resources within its borders, belonging to, managed by or
15 appertaining to such State, after adequate public notice and
16 opportunity for hearing and consideration of all public
17 comment.

18 **FINANCIAL RESPONSIBILITY**

19 **SEC. 104. (a)(1)** The owner or operator of any vessel
20 over three hundred gross tons (except a non-self-propelled
21 barge that does not carry oil as cargo or fuel), using any port
22 or place in the United States or the navigable waters or any
23 outer continental shelf facility or deepwater port facility,
24 shall establish and maintain, in accordance with regulations
25 promulgated by the President, evidence of financial responsi-
26 bility sufficient to meet the maximum amount of liability to

1 which, in the case of a tanker, the owner or operator could be
2 subjected under section 102(c)(1)(A) of this Act, or to which,
3 in the case of any other vessel, the owner or operator could
4 be subjected under section 102(c)(1)(B) of this Act, in a case
5 where the owner or operator would be entitled to limit liability
6 under that section. If the owner or operator owns or operates
7 more than one vessel, evidence of financial responsibility
8 need be established only to meet the maximum liability applicable
9 to the largest of such vessels.

10 (2) The Secretary of the Treasury shall withhold or
11 revoke the clearance required by section 4197 of the Revised
12 Statutes of the United States of any vessel subject to this
13 subsection that does not have the certification required under
14 this subsection or the regulations issued hereunder.

15 (3) The Secretary of the department in which the Coast
16 Guard is operating may (A) deny entry to any outer continental
17 shelf facility, and deepwater port facility, or any port or
18 place in the United States, or (B) detain at such a facility or
19 port or place, any vessel that, upon request, does not produce
20 the certification required under this subsection or the regulations
21 issued hereunder.

22 (4) Any vessel subject to the requirements of this subsection
23 which is found in the navigable waters without the
24 necessary evidence of financial responsibility shall be subject
25 to seizure by the United States of any oil carried as cargo.

1 (b) Each owner or operator with respect to an outer
2 continental shelf facility, deepwater port facility, or other off-
3 shore facility, shall establish and maintain evidence of finan-
4 cial responsibility sufficient to meet the maximum amount of
5 liability to which the owner or operator could be subjected
6 under section 102 of this Act in a case where the owner or
7 operator would be entitled to limit liability under that section,
8 or, in the case of an Outer Continental Shelf facility, in the
9 amount of \$100,000,000. Such evidence of financial respon-
10 sibility shall be established according to regulations pre-
11 scribed by the President.

12 (c) Financial responsibility under this section may be es-
13 tablished by any one, or by any combination, of the following
14 methods, which the President determines to be acceptable:
15 evidence of insurance, surety bond, guarantee, letter of
16 credit, qualification as a self-insurer, or other evidence of fi-
17 nancial responsibility. Any bond filed shall be issued by a
18 bonding company authorized to do business in the United
19 States. In promulgating requirements under this section, the
20 President is authorized to specify policy or other contractual
21 terms, conditions, or defenses which are necessary, or which
22 are unacceptable, in establishing such evidence of financial
23 responsibility in order to effectuate the purposes of this Act.

24 (d) Any claim for which liability may be established
25 under section 102 of this Act may be asserted directly

1 against any guarantor providing evidence of financial respon-
2 sibility for an owner or operator liable under that section for
3 costs and damages to which the claim pertains. In defending
4 against such a claim, the guarantor may invoke all rights and
5 defenses which would be available to the responsible party
6 under section 102. The guarantor may also invoke the de-
7 fense that the discharge was caused by the willful misconduct
8 of the owner or operator, but the guarantor may not invoke
9 any other defense that might be available in proceedings
10 brought by the owner or operator against the guarantor.

11 (e) The total liability of any guarantor in a direct action
12 suit brought under this section shall be limited to the aggre-
13 gate amount of the monetary limits of the policy of insurance,
14 guarantee, surety bond, letter of credit, or similar instrument
15 obtained from the guarantor by the person subject to liability
16 under section 102 for the purpose of satisfying the require-
17 ment for evidence of financial responsibility. Nothing in this
18 subsection shall be construed to limit any other State or Fed-
19 eral statutory, contractual, or common law liability of a guar-
20 antor, including, but not limited to, the liability of such guar-
21 antor for bad faith either in negotiation or in failing to negoti-
22 ate the settlement of any claim. Nothing in this subsection
23 shall be construed, interpreted, or applied to diminish the li-
24 ability of any person under section 102 of this Act or other
25 applicable law.

1 (f)(1) Any person who, after notice and an opportunity
2 for a hearing, is found to have failed to comply with the
3 requirements of this section or the regulations issued thereun-
4 der, or with a denial or detention order issued under subsec-
5 tion (a)(3) of this section, shall be liable to the United States
6 for a civil penalty, not to exceed \$25,000 per day of viola-
7 tion. The amount of the civil penalty shall be assessed by the
8 President by written notice. In determining the amount of the
9 penalty, the President shall take into account the nature, cir-
10 cumstances, extent, and gravity of the violation, the degree
11 of culpability, any history of prior violation, ability to pay,
12 and such other matters as justice may require. The President
13 may compromise, modify, or remit, with or without condi-
14 tions, any civil penalty which is subject to imposition or
15 which has been imposed under this paragraph. If any person
16 fails to pay an assessed civil penalty after it has become final,
17 the President may refer the matter to the Attorney General
18 for collection.

19 (2) In addition to, or in lieu of, assessing a penalty under
20 paragraph (1) of this subsection, the President may request
21 the Attorney General to secure such relief as necessary to
22 compel compliance with this section, including, but not limit-
23 ed to, a judicial order terminating operations. The district
24 courts of the United States shall have jurisdiction to grant

1 such relief as the public interest and the equities of the case
2 may require.

3 (g) Any regulation respecting financial responsibility,
4 which has been issued pursuant to any provision of law re-
5 pealed or superseded by this Act, and which is in effect on
6 the date immediately preceding the effective date of this Act,
7 shall be deemed and construed to be a regulation issued pur-
8 suant to this section. Such a regulation shall remain in full
9 force and effect unless and until superseded by new regula-
10 tions issued under this section.

11 LITIGATION, JURISDICTION AND VENUE

12 SEC. 105. (a) Review of any regulation promulgated
13 under this Act may be had upon application by any interested
14 person only in the Circuit Court of Appeals of the United
15 States for the District of Columbia. Any such application
16 shall be made within ninety days from the date of promulga-
17 tion of such regulations. Any matter with respect to which
18 review could have been obtained under this subsection shall
19 not be subject to judicial review in any civil or criminal pro-
20 ceeding for enforcement or to obtain damages or recovery of
21 response costs.

22 (b) Except as provided in subsections (a) and (c) of this
23 section, the United States district courts shall have exclusive
24 original jurisdiction over all controversies arising under this
25 Act, without regard to the citizenship of the parties or the
26 amount in controversy. Venue shall lie in any district in

1 which the discharge or injury or damages occurred, or in
2 which the defendant resides, may be found, has its principal
3 office, or has appointed an agent for service of process. For
4 the purposes of this section, the Fund shall reside in the Dis-
5 trict of Columbia.

6 (c) A State trial court of competent jurisdiction over
7 similar claims may consider claims under section 102 or
8 State law and any final judgment of such court (when no
9 longer subject to ordinary forms of review) shall be recog-
10 nized, valid, and enforceable for all purposes of section 102
11 and section 103 of this Act.

12 (d) The provisions of subsections (a), (b), and (c) of this
13 section shall not apply to any controversy or other matter
14 resulting from the assessment or collection of any tax, or to
15 the review of any regulation promulgated under the Internal
16 Revenue Code of 1954.

17 (e) The President may prescribe the necessary regula-
18 tions to carry out this Act.

19 (f) No provision of this Act shall be deemed or held to
20 moot any litigation concerning any discharge of oil, or any
21 damages associated therewith, commenced prior to enact-
22 ment of this Act.

23 (g)(1) Except as provided in paragraphs (3) and (4), no
24 action may be commenced for damages (as defined in section
25 101(6)) under this Act, unless that action is commenced

1 within three years after the date of the discovery of the loss
2 and its connection with the release in question, or in the case
3 of damages under section 102(a)(2)(C), if later, the date on
4 which regulations are promulgated under section 102(d)(3) of
5 this Act.

6 (2) An action for recovery of removal costs referred to in
7 section 102(a)(1) must be commenced within three years after
8 completion of the removal action. In any such action de-
9 scribed in this subsection, the court shall enter a declaratory
10 judgment on liability for removal costs or damages that will
11 be binding on any subsequent action or actions to recover
12 further removal costs or damages. Except as otherwise pro-
13 vided in this paragraph, an action may be commenced under
14 section 102 for recovery of removal costs at any time after
15 such costs have been incurred.

16 (3) No action for contribution for any removal costs or
17 damages may be commenced more than three years after—

18 (A) the date of judgment in any action under this
19 Act for recovery of such costs or damages, or

20 (B) the date of entry of a judicially approved set-
21 tlement with respect to such costs or damages.

22 (4) No action based on rights subrogated pursuant to
23 this Act by reason of payment of a claim may be commenced
24 under this Act more than three years after the date of pay-
25 ment of such claim.

1 (5) The time limitations contained herein shall not begin
2 to run—

3 (A) against a minor until the earlier of the date
4 when such minor reaches eighteen years of age or the
5 date on which a legal representative is duly appointed
6 for such minor, or

7 (B) against an incompetent person until the earlier
8 of the date on which such incompetent's incompetency
9 ends or the date on which a legal representative is
10 duly appointed for such incompetent.

11 STATE LAWS AND PROGRAMS

12 SEC. 106. (a) Nothing in this Act shall be construed or
13 interpreted as preempting any State from imposing any addi-
14 tional liability or requirements with respect to the discharge
15 of oil or other pollution by oil within such State. Nothing in
16 this Act shall affect or modify in any way the obligations or
17 liabilities of any person under other Federal or State law,
18 including common law, with respect to discharges of oil.

19 (b) Nothing in this Act or in section 9507 of the Internal
20 Revenue Code of 1954 shall in any way affect, or be con-
21 strued to affect, the authority of any State—

22 (1) to establish, or to continue in effect, a fund
23 any purpose of which is to pay for costs or damages
24 arising out of, or directly resulting from, oil pollution
25 or the substantial threat of oil pollution; or

1 (2) to require any person to contribute to such a
2 fund.

3 (c) A State may enforce, on the navigable waters of
4 such State, the requirements for evidence of financial respon-
5 sibility applicable under section 104 of this Act.

6 (d) The President shall consult with the affected State
7 or States on the appropriate removal action to be taken. Re-
8 moval with respect to any discharge or incident shall be con-
9 sidered completed when so determined by the President and
10 the Governor or Governors of the affected State or States.

11 (e) Nothing in this Act, the Act of March 3, 1851, as
12 amended (46 U.S.C. 183 et seq.), or section 9507 of the
13 Internal Revenue Code of 1954, shall in any way affect, or
14 be construed to affect, the authority of the United States or
15 any State or political subdivision thereof—

16 (1) to impose additional liability or additional re-
17 quirements, or

18 (2) to impose, or to determine the amount of, any
19 fine or penalty (whether criminal or civil in nature) for
20 any violation of law,

21 relating to the discharge, or substantial threat of a discharge,
22 of oil.

23 STUDY OF SPILL PREVENTION IN RESTRICTED WATERS

24 SEC. 107. The President shall conduct a study, and
25 report the results of such study to the Congress not later
26 than one year after the enactment of this Act, on improved

1 methods for the prevention of discharges of oil in restricted
2 waters and similar portions of bays, estuaries, and near shore
3 waters. In the conduct of such study, the President shall ex-
4 amine the causes of recent major discharges of oil from ves-
5 sels in the Delaware River, and consider modifications in
6 tanker construction and operation standards, crew training
7 and locale familiarization requirements, improvements in
8 navigation aids, and other approaches with the potential for
9 reducing the likelihood for discharges of oil in such waters.

10

FEDERAL RESPONSIBILITY

11 SEC. 108. Section 311(c)(1) of the Federal Water Pollu-
12 tion Control Act is amended by striking all that follows after
13 "1976)", and inserting the following in lieu thereof: "the
14 President shall remove or arrange for the removal of such oil
15 or substance at any time. The President is not required to
16 remove or arrange for removal of such oil or substance only if
17 the President finds that such removal will be done properly
18 and promptly by the owner or operator of the vessel, onshore
19 facility, or offshore facility, from which the discharge occurs.
20 Such owner or operator must demonstrate to the satisfaction
21 of the President that such owner or operator has the financial
22 resources and technical capability necessary to effectively
23 remove the oil or hazardous substance."

1 TITLE II—CONFORMING AMENDMENTS

2 TRANS-ALASKA PIPELINE FUND

3 SEC. 201. (a) Section 204(b) of the Trans-Alaska Pipe-
4 line Authorization Act is amended, in the first sentence—

5 (1) by inserting after the words “any area” the
6 words “in the State of Alaska”;

7 (2) by inserting after the words “any activities”
8 the words “related to the Trans-Alaska Oil Pipeline”;
9 and

10 (3) by inserting at the end of the subsection the
11 following new sentence: “This subsection shall not
12 apply to removal costs covered by the Oil Spill Liabil-
13 ity and Compensation Act of 1988.”.

14 Subsection (c) of section 204 of the Trans-Alaska Pipe-
15 line Authorization Act is repealed. The Trans-Alaska Pipe-
16 line Liability Fund is abolished. All assets of that fund, as of
17 the effective date of this section, shall be transferred to the
18 Fund established under this Act. The Oil Spill Compensation
19 Fund shall assure all liability incurred by the Trans-Alaska
20 Pipeline Liability Fund under the terms of subsection (c) of
21 section 204 of the Trans-Alaska Pipeline Authorization Act.

22 (c) Trustees and former trustees of the Trans-Alaska
23 Pipeline Liability Fund who were designated by the Secre-
24 tary of the Interior shall not be subject to any liability in-
25 curred by that Fund or by the present and past officers and

1 trustees of that Fund, other than liability for gross negligence
2 or willful misconduct.

3 INTERVENTION ON THE HIGH SEAS ACT

4 SEC. 202. Section 17 of the Intervention on the High
5 Seas Act is amended to read as follows:

6 "SEC. 17. The Fund established under the Oil Spill Li-
7 ability and Compensation Act of 1988 shall be available to
8 the Secretary for actions taken under sections 5 and 7 of this
9 Act."

10 CLEAN WATER ACT

11 SEC. 203. Section 311 of the Clean Water Act is
12 amended as follows:

13 (a) Subparagraph (H) of paragraph (2) of subsection (c)
14 amended by striking out "from the fund established under
15 subsection (k) of this section for the reasonable costs incurred
16 in such removal" and inserting in lieu thereof the following:
17 "in the case of any discharges of oil from a vessel or facility,
18 for the reasonable costs incurred in such removal from the
19 Fund established under the Oil Spill Liability and Compensa-
20 tion Act of 1988".

21 (b) Subsection (d) is amended by striking out the last
22 sentence.

23 (c)(1) Subsections (f), (g), and (i) of section 311 of the
24 Clean Water Act shall not apply with respect to any dis-
25 charge of oil resulting in removal costs for which liability is
26 established under section 102 of this Act.

1 (2) Paragraphs (2) and (3) of subsection (f) are amended
2 by striking out "under subsection (c) for the removal of such
3 oil or substance by the United States Government" each
4 place it appears and inserting in lieu thereof "under subsec-
5 tion (c) for the removal of such oil or substance by the United
6 States Government and for payments made pursuant to sec-
7 tion 103(a)(4)(A) of the Oil Pollution Liability and Compensa-
8 tion Act of 1988".

9 (d) Subsection (i) is amended by striking out "(1)" after
10 "(i)" and striking out paragraphs (2) and (3).

11 (e) Subsection (k) is repealed. Any amounts remaining in
12 the revolving fund established under that subsection shall be
13 deposited in the Fund established under this Act. The Oil
14 Spill Compensation Fund shall assume all liability incurred
15 by the revolving fund established under section 311(k) of the
16 Clean Water Act.

17 (f) Subsection (1) is amended by striking out the second
18 sentence.

19 (g) Subsection (p) is repealed.

20 (h) Section 311 is amended by adding at the end thereof
21 the following new subsection:

22 "(s) The Oil Spill Compensation Fund, established
23 under the Oil Pollution Liability and Compensation Act of
24 1988, shall be available to carry out subsections (c), (d), (i),
25 and (l) as those subsections apply to discharges, or substantial

1 threats of discharges, of oil. Any amounts received by the
2 United States under this section shall be deposited in such Oil
3 Spill Compensation Fund.”.

4 DEEPWATER PORT ACT

5 SEC. 204. The Deepwater Port Act of 1974 is amended
6 as follows:

7 (a) In section 4(c)(1) strike “section 18(l) of this Act;”
8 and insert in lieu thereof “section 104 of the Oil Spill Liabil-
9 ity and Compensation Act of 1988,”.

10 (b) Subsections (b), (d), (e), (f), (g), (h), (i), (j), (l), (n), and
11 paragraph (1) of subsection (m) of section 18 are deleted.

12 (c) Paragraph (3) of subsection (c) of section 18 is
13 amended by striking “Deepwater Port Liability Fund estab-
14 lished pursuant to subsection (f) of this section”, and inserting
15 in lieu thereof “fund established under the Oil Spill Liability
16 and Compensation Act of 1988”.

17 (d) Subsections (c), (k), and (m) of section 18 are redes-
18 ignated (b), (c), and (d) respectively, and paragraphs (2), (3),
19 and (4) of subsection (m) are redesignated (1), (2), and (3),
20 respectively.

21 (e) Any amounts remaining in the Deepwater Port Li-
22 ability Fund, established under section 18(f) of the Deep-
23 water Port Act of 1974, shall be deposited in the Fund estab-
24 lished under this Act. The Oil Spill Compensation Fund shall
25 assume all liability incurred by the Deepwater Port Liability
26 Fund.

1 OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS

2 SEC. 205. Title III of the Outer Continental Shelf
3 Lands Act Amendments of 1978 is hereby repealed. Any
4 amounts remaining in the Offshore Oil Pollution Compensa-
5 tion Fund established under section 302 of that title shall be
6 deposited in the Fund established under this Act. The Oil
7 Spill Compensation Fund shall assume all liability incurred
8 by the Offshore Oil Pollution Compensation Fund.

9 NOTICE TO STATE; INCREASED PENALTIES FOR FAILURE
10 TO REPORT

11 SEC. 206. (a) The first sentence of section 311(b)(5) of
12 the Clean Water Act is amended by inserting after "of the
13 United States Government" the phrase "and of any affected
14 State".

15 (b) The second sentence of section 311(b)(5) of the Clean
16 Water Act is amended by striking "fined not more than
17 \$10,000, or imprisoned for not more than one year, or both"
18 and inserting in lieu thereof "fined in accordance with the
19 applicable provisions of title 18 of the United States Code, or
20 imprisoned for not more than three years (or not more than
21 five years in the case of a second or subsequent conviction),
22 or both".

101ST CONGRESS
1ST SESSION

S. 687

To amend the Clean Water Act to expand authority for penalties for discharges of oil and hazardous substances and to provide for an assessment of oil spill contingency plans.

IN THE SENATE OF THE UNITED STATES

APRIL 4 (legislative day, JANUARY 3), 1989

Mr. BAUCUS (for himself, Mr. MITCHELL, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Clean Water Act to expand authority for penalties for discharges of oil and hazardous substances and to provide for an assessment of oil spill contingency plans.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. PENALTIES.—(a) Section 311(b)(6) of the
4 Federal Water Pollution Control Act is amended by striking
5 subparagraph (B) and inserting in lieu thereof the following:

6 “(B) The Administrator, taking into account the gravity
7 of the offense, and the standard of care manifested by the
8 owner, operator, or person in charge, may commence a civil
9 action against any such person subject to the penalty under

1 subparagraph (A) of this paragraph to impose a penalty based
2 on consideration of the size of the business of the owner or
3 operator, the effect on the ability of the owner or operator to
4 continue in business, the gravity of the violation, and the
5 nature, extent, and degree of success of any efforts made by
6 the owner, operator, or person in charge to minimize or miti-
7 gate the effects of such discharge of oil or hazardous sub-
8 stances. The amount of such penalty shall be not less than
9 \$50,000, but not exceeding an amount equal to \$50 per
10 barrel except where the United States can show that such
11 discharge was the result of willful negligence or willful mis-
12 conduct within the privity and knowledge of the owner, oper-
13 ator, or person in charge, such penalty shall be not less than
14 \$250,000, but not exceeding an amount equal to \$250 per
15 barrel. Each violation is a separate offense. Any action in
16 this subparagraph may be brought in the district court of the
17 United States for the district in which the defendant is locat-
18 ed or resides or is doing business, and any such court shall
19 have jurisdiction to assess such penalty. No action may be
20 commenced under this clause where a penalty has been as-
21 sessed under clause (A) of this paragraph.”.

22 (b) Section 311(b)(6)(C) is amended by adding the words
23 “oil or” following the words “for the discharge of” in the
24 first sentence.

1 SEC. 2. REPORT TO CONGRESS.—Section 311(c) of the
2 Federal Water Pollution Control Act is amended by adding
3 at the end thereof the following new paragraph:

4 “(3) The Administrator, in consultation with the Secre-
5 tary of the Department in which the Coast Guard is operat-
6 ing, shall submit to the Congress within one year of the date
7 of enactment of this paragraph and biennially thereafter a
8 report assessing the adequacy of provisions of the National
9 Contingency Plan, and any regulations pursuant to subsec-
10 tion (j), concerning discharges of oil. The report shall include
11 a summary of discharges of oil prohibited pursuant to para-
12 graph (b)(3) of this section, an assessment of the actions
13 taken in response to such discharges, and any recommenda-
14 tions for needed improvements to existing statutes, regula-
15 tions, or programs for preventing and responding to oil
16 spills.”.

101ST CONGRESS
1ST SESSION

S. 1066

To establish a domestic liability and compensation system for oil pollution from vessels and facilities and to implement the 1984 Protocols to the 1969 Civil Liability and 1971 Fund Conventions concerning seagoing tanker-source oil pollution.

IN THE SENATE OF THE UNITED STATES

MAY 18 (legislative day, JANUARY 3), 1989

Mr. CHAFEE (by request) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To establish a domestic liability and compensation system for oil pollution from vessels and facilities and to implement the 1984 Protocols to the 1969 Civil Liability and 1971 Fund Conventions concerning seagoing tanker-source oil pollution.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*

1 SECTION 1. SHORT TITLE, STATEMENT OF FINDINGS AND
2 DECLARATION OF PURPOSE, AND TABLE OF
3 CONTENTS.

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Comprehensive Oil Pollution Liability and Compensation
6 Act of 1989”.

7 (b) STATEMENT OF FINDINGS AND DECLARATION OF
8 PURPOSE.—(1) Major oilspill incidents can cause serious en-
9 vironmental and economic damage. Oilspills pollute beaches,
10 damage the commercial fishing industry, harm private prop-
11 erty and natural resources, and can have other significant
12 environmental and economic effects. Unlike other types of
13 damages resulting from hazardous substances incidents, oil-
14 spills pose unique problems and demand unique solutions.

15 (2) Therefore, it is hereby declared to be the policy of
16 the United States and the purpose of this Act to create a
17 unique liability and compensation system to address the
18 unique problems presented by oilspills, under which it shall
19 be the primary responsibility of the parties responsible for a
20 vessel or facility from which oil is discharged to fund the
21 cleanup of such pollution when it occurs, and compensate
22 those damaged by such pollution. Removal and restoration
23 costs which exceed the limits of liability of the responsible
24 party will be compensated from a fund financed from fees on
25 oil. Economic damages which exceed the limits of liability of
26 the responsible party may be recovered under applicable

1 State laws. The Act authorizes the President to order a re-
 2 sponsible party to undertake a removal action and makes
 3 conforming changes to civil and criminal liability provisions
 4 to accomplish this.

5 The goal of this Act is threefold: To strengthen the four
 6 existing oil pollution liability and compensation regimes
 7 under the Federal Water Pollution Control Act, the Trans-
 8 Alaska Pipeline Authorization Act, the Deepwater Port Act,
 9 and the Outer Continental Shelf Lands Act to create a uni-
 10 fied and comprehensive program; two, to establish a domestic
 11 liability and compensation system financed by vessel and fa-
 12 cility owners and the oil industry to compensate the United
 13 States Government, the States and Indian tribes for removal
 14 and restoration costs associated with oilspills; and three, to
 15 provide greater protection from foreign tanker oilspills by im-
 16 plementing the 1984 Protocols to the 1969 Civil Liability
 17 and 1971 Fund Conventions.

18 (c) TABLE OF CONTENTS.—

Sec. 1. Short title and table of contents.

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

Sec. 101. Definitions.

Sec. 102. Liability.

Sec. 103. Uses of the fund.

Sec. 104. Claims procedure.

Sec. 105. Designation and advertisement.

Sec. 106. Subrogation.

Sec. 107. Financial responsibility.

Sec. 108. Litigation, jurisdiction, and venue.

Sec. 109. Relationship to other law.

Sec. 110. Effective date.

Sec. 111. Federal cause of action based on State or other Federal law.

TITLE II—CONFORMING AMENDMENTS

- Sec. 201. Trans-Alaska pipeline fund.
- Sec. 202. Intervention on the High Seas Act.
- Sec. 203. Federal Water Pollution Control Act.
- Sec. 204. Deepwater Port Act.
- Sec. 205. Outer Continental Shelf Lands Act Amendments.
- Sec. 206. Enforcement of Federal Water Pollution Control Act.
- Sec. 207. Title 26, United States Code.

TITLE III—IMPLEMENTATION OF INTERNATIONAL CONVENTIONS

- Sec. 301. Definitions.
- Sec. 302. Applicability of conventions.
- Sec. 303. Recognition of international fund.
- Sec. 304. Action in United States courts.
- Sec. 305. Contribution to international fund.
- Sec. 306. Recognition of foreign judgments.
- Sec. 307. Financial responsibility.
- Sec. 308. Regulations.

1 TITLE I—OIL POLLUTION LIABILITY AND 2 COMPENSATION

3 SEC. 101. DEFINITIONS.

4 For the purposes of this Act, the term—

5 (1) “act of God” means an unanticipated grave
6 natural disaster or other natural phenomenon of an ex-
7 ceptional, inevitable, and irresistible character the ef-
8 fects of which could not have been prevented or avoid-
9 ed by the exercise of due care or foresight;

10 (2) “claim” means a demand in writing for a sum
11 certain;

12 (3) “claimant” means any person who presents a
13 claim for compensation under this Act;

14 (4) “costs”, except where the context indicates
15 otherwise, means removal costs, restoration costs, and
16 restoration assessment costs;

5

1 (5) "damages" means damages for economic loss
2 specified in section 102(a)(3) of this Act;

3 (6) "discharge" means any emission (other than
4 natural seepage), intentional or unintentional, and in-
5 cludes, but is not limited to, spilling, leaking, pumping,
6 pouring, emitting, emptying, or dumping;

7 (7) "exclusive economic zone" means the zone es-
8 tablished by Presidential Proclamation numbered 5030,
9 dated March 10, 1983;

10 (8) "facility" means an onshore facility or an off-
11 shore facility other than a public facility;

12 (9) "foreign offshore unit" means a structure or
13 group of structures which is located, in whole or in
14 part, in the territorial sea or on or over the continental
15 shelf of a foreign country and is or was used for one or
16 more of the following purposes: exploring for, drilling
17 for, producing, storing handling, transferring, process-
18 ing, or transporting oil produced from the seabed be-
19 neath the foreign country's territorial sea or from the
20 foreign country's continental shelf;

21 (10) "Fund" means the Oilspill Liability Trust
22 Fund, established by section 9509 of the Internal Rev-
23 enue Code of 1954;

1 (11) "gross ton" means tonnage measured in ac-
2 cordance with the provisions of the International Con-
3 vention on Tonnage Measurement of Ships, 1969;

4 (12) "guarantor" means any person, other than
5 the responsible party, who provides evidence of finan-
6 cial responsibility for a responsible party under this
7 Act;

8 (13) "incident" means any occurrence or series of
9 occurrences having the same origin, involving one or
10 more vessels, facilities, or any combination thereof, re-
11 sulting in the discharge or substantial threat of dis-
12 charge of oil;

13 (14) "Indian tribe" means any Indian tribe, band,
14 nation, or other organized group or community, but not
15 including any Alaska Native regional or village corpo-
16 ration, which is recognized as eligible for the special
17 programs and services provided by the United States
18 to Indians because of their status as Indians;

19 (15) "lessee" means a person holding a leasehold
20 interest in an oil or gas lease on lands beneath naviga-
21 ble waters (as such term is defined in section 2 of the
22 Submerged Lands Act (43 U.S.C. 1301)) or on sub-
23 merged lands of the Outer Continental Shelf, granted
24 or maintained under applicable State law or the Outer
25 Continental Shelf Lands Act;

1 (16) "mobile offshore drilling unit" (MODU)
2 means a vessel capable of use as an offshore facility;

3 (17) "National Contingency Plan" means the Na-
4 tional Contingency Plan published under section 311(c)
5 of the Federal Water Pollution Control Act or revised
6 pursuant to section 105 of the Comprehensive Envi-
7 ronmental Response, Compensation, and Liability Act;

8 (18) "natural resources" includes land, fish, wild-
9 life, biota, water, ground water, drinking water sup-
10 plies, and other such resources belonging to, managed
11 by, held in trust by, appertaining to, or otherwise con-
12 trolled by the United States (including the resources of
13 the exclusive economic zone), any State or local gov-
14 ernment or Indian tribe, or any foreign government;

15 (19) "navigable waters" means the waters of the
16 United States, including the territorial sea;

17 (20) "offshore facility" means—

18 (A) a facility of any kind (other than a
19 vessel, or a public vessel or facility), which is lo-
20 cated, in whole or in part, on lands beneath navi-
21 gable waters (as such term is defined in section 2
22 of the Submerged Lands Act (43 U.S.C. 1301) or
23 on the Outer Continental Shelf and is or was used
24 for one or more of the following purposes: explor-
25 ing for, drilling for, producing, storing, handling,

1 transferring, processing, or transporting oil pro-
2 duced from lands beneath navigable waters of the
3 Outer Continental Shelf; and

4 (B) also means a deepwater port licensed
5 under the Deepwater Port Act of 1974, as
6 amended;

7 (21) "oil" means crude petroleum oil, residual fuel
8 oil, any refined petroleum product or fraction or resi-
9 due therefrom, but does not include petrochemicals;

10 (22) "onshore facility" means any facility (includ-
11 ing, but not limited to, motor vehicles, pipelines and
12 rolling stock) of any kind, other than a public facility,
13 any portion of which is located in, on, or under, any
14 land within the United States other than submerged
15 land;

16 (23) "owner or operator" means (A) in the case of
17 a vessel, any person owning, operating, or chartering
18 by demise, such vessel, and (B) in the case of an on-
19 shore facility, and an offshore facility, any person
20 owning or operating such onshore facility or offshore
21 facility, and (C) in the case of any abandoned offshore
22 facility, the person who owned or operated such facility
23 immediately prior to such abandonment;

24 (24) "person" means an individual, corporation,
25 partnership, association, State, municipality, commis-

1 sion, or political subdivision of a State, or any inter-
2 state body;

3 (25) "person otherwise subject to the jurisdiction
4 of the United States" means any person, whether nat-
5 ural, corporate, or otherwise, who is a citizen or na-
6 tional of the United States;

7 (26) "permittee" means a person holding an au-
8 thorization, license, or permit for geological exploration
9 issued under section 11 of the Outer Continental Shelf
10 Lands Act or applicable State law;

11 (27) "public facility" means any facility owned or
12 operated by the United States, either directly or by
13 contract with a private party;

14 (28) "public vessel" means a vessel owned or
15 bareboat chartered (or chartered by demise) and oper-
16 ated by the United States, or by a State or political
17 subdivision thereof, or by a foreign nation, except when
18 such vessel is engaged in commerce;

19 (29) "remove" or "removal" refers to removal of
20 the oil from the water and shorelines or the taking of
21 such other actions as may be necessary to minimize or
22 mitigate damage to the public health or welfare, in-
23 cluding, but not limited to, damage to fish, shellfish,
24 wildlife, and public and private property, shorelines,

1 and beaches and including actions taken with respect
2 to a substantial threat of a discharge;

3 (30) "removal costs" means the costs of removal
4 taken after a discharge of oil has occurred, or, where
5 there was a substantial threat of a discharge of oil, the
6 costs and action taken to prevent, minimize, or miti-
7 gate oil pollution from that incident. Such removal
8 costs are (1) actual costs incurred by the United
9 States, or when under the direction of the responsible
10 Federal official, a State or an Indian tribe, not incon-
11 sistent with the National Contingency Plan, and (2)
12 any other necessary costs of response incurred by any
13 other person consistent with the National Contingency
14 Plan.

15 (31) "responsible party" means the following:

16 (A) VESSELS.—In the case of a vessel, the
17 responsible party is any person owning, operating,
18 or chartering by demise, the vessel.

19 (B) FACILITIES.—In the case of a facility
20 (including a pipeline but not including any other
21 offshore facility), the responsible party is any
22 person owning or operating the facility.

23 (C) OFFSHORE FACILITIES.—In the case of
24 an offshore facility (other than a pipeline or a
25 deepwater port licensed under the Deepwater

1 Port Act of 1974), and except as provided in sec-
2 tion 102(a)(5), the responsible party is the lessee
3 or permittee of the area in which the facility is
4 located, or the holder of a right of use and ease-
5 ment granted under applicable State law or the
6 Outer Continental Shelf Lands Act for the area in
7 which the facility is located (where the holder is a
8 different person than the lessee or permittee).

9 (D) DEEPWATER PORTS.—In the case of a
10 deepwater port licensed under the Deepwater
11 Port Act of 1974, the responsible party is the
12 licensee.

13 (E) ABANDONMENT.—In the case of an
14 abandoned vessel, an onshore facility, or an off-
15 shore facility, or the expiration of a lease, permit,
16 license, or right of way, responsible parties shall
17 be the persons who were, or would have been, re-
18 sponsible parties immediately prior to the aban-
19 donment of the vessel, onshore facility, or offshore
20 facility, or the expiration of the lease, permit, li-
21 cense, or right of way: *Provided*, That this Act
22 shall not be construed as authorizing abandonment
23 of vessels or facilities;

24 (32) "restoration costs" means the sums neces-
25 sary for the reasonable restoration or replacement of

1 natural resources, or reasonable acquisition of equiva-
2 lent natural resources, which have been injured, de-
3 stroyed, or lost, including—

4 “(A) as restoration costs, the sums necessary
5 for the restoration or replacement of the land,
6 fish, wildlife, biota, water, drinking water supplies
7 and other such natural resources, or acquisition of
8 their equivalent, which have been injured, de-
9 stroyed, or lost, and,

10 “(B) costs of developing and obtaining plans
11 referred to in paragraph (3) of subsection (e) of
12 section 102 of this title and the costs of determin-
13 ing the assessment costs under clause (A) of this
14 subsection and shall also include the sums neces-
15 sary for the reasonable restoration or replacement
16 of real estate, fish, wildlife, biota, water, ground
17 water, drinking water supplies, and other such re-
18 sources which are privately owned, or reasonable
19 acquisition of their equivalent, which have been
20 injured, destroyed, or lost, including restoration
21 assessment costs.

22 (33) “Secretary” means the Secretary of Trans-
23 portation;

24 (34) “State” means a State of the United States,
25 Guam, Puerto Rico, the Virgin Islands, American

1 Samoa, the District of Columbia, the Northern Mariana
2 Islands, the Trust Territory of the Pacific Islands, and
3 any other territory or possession of the United States.

4 (35) "subsistence use" means the customary and
5 traditional uses by rural residents of wild, renewable
6 resources for direct personal or family consumption,
7 such as food, shelter, fuel, clothing, tools, and trans-
8 portation; for making and selling of handicraft articles
9 out of inedible byproducts of fish and wildlife resources
10 taken for personal or family consumption; for barter, or
11 sharing for personal or family consumption; and for
12 customary trade.

13 (36) "tanker" means a vessel constructed or
14 adapted for the carriage of oil in bulk or in commercial
15 quantities as cargo; except that the term does not in-
16 clude a nonself-propelled vessel of less than three thou-
17 sand gross tons carrying oil in bulk as cargo or in resi-
18 due from cargo and operating on waters of the United
19 States lying inside the baseline from which the territo-
20 rial sea is measured or on waters outside such baseline
21 which are part of the Gulf Intracoastal Waterway;

22 (37) "territorial sea" means the territorial sea
23 established under Presidential Proclamation numbered
24 5928, December 27, 1988.

1 (38) "United States" mean the several States of
2 the United States, the District of Columbia, the Com-
3 monwealth of Puerto Rico, Guam, American Samoa,
4 the United States Virgin Islands, the Commonwealth
5 of the Northern Marianas, and any other territory or
6 possession over which the United States has jurisdic-
7 tion; and

8 (39) "vessel" means every description of water-
9 craft or other artificial contrivance used, or capable of
10 being used, as a means of transportation on water
11 other than a public vessel.

12 SEC. 102. LIABILITY.

13 (a) ELEMENTS OF LIABILITY.—(1) JOINT, SEVERAL,
14 AND STRICT LIABILITY.—Notwithstanding any other provi-
15 sion of law and subject only to the defenses in subsection (b),
16 the responsible party or parties for a vessel or a facility from
17 which oil is discharged, or which poses the substantial threat
18 of a discharge of oil, into or upon the navigable waters or
19 adjoining shorelines or the waters of the exclusive economic
20 zone or a party liable under paragraph (5) is both jointly and
21 severally liable, and strictly liable for the costs, and damages
22 specified in paragraph (2) and (3) that arise out of or directly
23 result from such discharge or threat of discharge. In addition
24 to actions brought against such responsible parties or third
25 parties, such costs and damages shall constitute a maritime

1 lien on any vessel owned by such responsible parties or third
2 parties and may be recovered in an action in rem in the dis-
3 trict court of the United States for any district within which
4 any such vessel may be found. In the event that a party is
5 determined to be less than 30 per centum liable, then that
6 party shall be severally and not jointly liable for damages.

7 (2) COVERED REMOVAL COSTS AND RESTORATION
8 COSTS.—(A) REMOVAL COSTS.—Removal costs shall be re-
9 coverable by any claimant incurring the removal costs.

10 (B) RESTORATION COSTS.—Restoration costs shall be
11 recoverable by the United States trustee, State trustee, or
12 Indian tribal trustee.

13 (C) REBUTTABLE PRESUMPTION.—There shall be a
14 presumption, rebuttable only by clear and convincing evi-
15 dence, that—

16 (i) all removal costs actually incurred by the
17 United States, including all internal agency costs ne-
18 cessitated by the incident, were consistent with the
19 National Contingency Plan;

20 (ii) all determinations made by the United States
21 pursuant to section 301(C) of the Comprehensive Envi-
22 ronmental Response, Compensation and Liability Act,
23 and implementing regulations, as to the extent of
24 injury to, destruction of, or loss of natural resources
25 and the monetary amount of damages resulting, includ-

1 ing the cost of assessing such injury, destruction, or
2 loss, are reasonable; and

3 (iii) all compensation actually paid by the Fund
4 pursuant to claims submitted under section 104 was in
5 a proper amount and that such costs or damages were
6 not attributable to any act or omission on the part of
7 the United States or any entity from which it acquired
8 rights by subrogation.

9 (3) COVERED DAMAGES.—The damages for economic
10 loss referred to in paragraph (1) are the following:

11 (A) REAL OR PERSONAL PROPERTY.—Damages
12 for injury to, or economic losses resulting from destruc-
13 tion of, real or personal property (not otherwise recov-
14 erable under paragraph (2)(B) of this subsection), which
15 shall be recoverable by a claimant who owns or leases
16 such property.

17 (B) SUBSISTENCE USE.—Damages for loss of
18 subsistence use of natural resources, which shall be re-
19 coverable by any claimant who so used natural re-
20 sources which have been injured, destroyed, or lost.

21 (C) REVENUES.—Damages equal to the loss of
22 property taxes, royalties, rents, or net profit shares, for
23 a period not to exceed one year, due to the injury, de-
24 struction, or loss of natural resources, which shall be

1 recoverable by the Government of the United States, a
2 State, or a political subdivision thereof.

3 (D) PROFITS AND EARNING CAPABILITY.—Dam-
4 ages equal to the loss of profits or impairment of earn-
5 ing capacity due to the injury, destruction, or loss of
6 natural resources, which shall be recoverable by any
7 claimant who derives at least 25 per centum of his or
8 her earnings from the activities which utilize such nat-
9 ural resources, or, if such activities are seasonal in
10 nature, 25 per centum of his or her earnings during the
11 applicable season.

12 (4) DIVISION OF RESPONSIBILITY FOR MODU DIS-
13 CHARGES ON OR ABOVE THE WATER.—

14 (A) TREATED FIRST AS A TANKER.—For pur-
15 poses of determining the responsible party and applying
16 this Act, a mobile offshore drilling unit which is being
17 used as an offshore facility shall be deemed to be a
18 tanker with respect to the discharge, or the substantial
19 threat of a discharge, of oil on or above the surface of
20 the water, except as provided in subparagraph (B).

21 (B) TREATED AS A FACILITY FOR EXCESS LI-
22 ABILITY.—To the extent that removal costs and dam-
23 ages from any incident described in subparagraph (A)
24 exceed the amount for which the responsible party is
25 liable under subparagraph (A) (as such amount may be

1 limited under subsection (c)(1)(A)), the mobile offshore
2 drilling unit shall be deemed to be an offshore facility.

3 (5) LIABILITY OF THIRD PARTIES.—(A) IN GENER-
4 AL.—In any case where the responsible party for a vessel or
5 facility can prove that an incident was caused solely by an
6 act or omission of one or more third parties (or in the case of
7 the United States Government, solely by the negligence of
8 that Government) in accordance with subsection (b)(1)(B) (or
9 solely by such an act or omission or negligence in combina-
10 tion with an act of God or an act of war), such third party or
11 parties shall be liable under this section.

12 (B) LIMITATION APPLIED.—(i) OWNER OR OPERATOR
13 OF VESSEL OR FACILITY.—If such third party or parties are
14 the owner or operator of a vessel or facility which caused the
15 incident, the liability of such third party or parties shall be
16 subject to the limits provided in subsection (c), as applied
17 with respect to such vessel or facility.

18 (ii) OTHER CASES.—In any other case, the liability of
19 such third party or parties shall not exceed the limitation
20 which would have been applicable to the responsible party of
21 the vessel or facility from which the discharge actually oc-
22 curred if such responsible party were liable.

23 (C) This subparagraph applies to cases to which sub-
24 paragraph (A) of this paragraph applies, when the vessel or
25 facility from which the discharge occurred carried oil as

1 cargo, or handled or stored oil in bulk. The responsible party
2 of that vessel or facility shall pay all costs or damages for
3 which it would otherwise have been liable absent the de-
4 fenses provided under subsection (b)(1)(B), (b)(1)(C), or
5 (b)(1)(D) of this section. Upon such payments the responsible
6 party shall be subrogated to all rights to recover such costs
7 or damages under this paragraph.

8 (b) EXCLUSIVE DEFENSES TO LIABILITY.—(1) COM-
9 PLETE DEFENSES.—Except when the responsible party has
10 failed or refused to report the incident where required by law
11 and the responsible party knows or has reason to know of the
12 incident, and except with respect to an offshore facility, there
13 is no liability under subsection (a) if the responsible party
14 proves that the incident was solely caused by one, or any
15 combination of the following:

16 (A) an act of God, an act of war;

17 (B) an act or omission of a third party other than
18 an employee or agent of the defendant, or than one
19 whose act or omission occurs in connection with a con-
20 tractual relationship, existing directly or indirectly,
21 with the responsible party, if the responsible party es-
22 tablishes by a preponderance of the evidence that (a)
23 he exercised due care in light of all relevant facts and
24 circumstances, and (b) he took precautions against fore-
25 seeable acts or omissions of any such third party and

1 the consequences that could foreseeably result from
2 such acts or omissions; and

3 (C) the negligence of the United States Govern-
4 ment, excluding any actions which may be taken re-
5 specting the discretionary function decisions of location,
6 type, and numbers of aids to navigation or the conduct
7 of vessel inspection and merchant marine personnel li-
8 censing activities or the acquisition and timely dissemi-
9 nation of navigational data to users and the identifica-
10 tion, survey, and charting of navigational obstacles.

11 (2) BARS TO RECOVERY BY PARTICULAR CLAIM-
12 ANTS.—A claimant may not recover under subsection (a)—

13 (A) as to a particular claimant, other than a natu-
14 ral resource trustee acting in its capacity as a natural
15 resource trustee, the incident is caused, in whole or in
16 part, by the willful misconduct of that claimant; or

17 (B) as to a particular claimant, other than a natu-
18 ral resource trustee acting in its capacity as a natural
19 resource trustee, to the extent that the incident is
20 caused by the negligence of that claimant except that
21 the negligence of any entity of the United States Gov-
22 ernment shall not be imputed to the Fund for the pur-
23 poses of this paragraph in an action brought by the
24 Fund under this title, other than an action for a claim
25 which the Fund has paid to that entity.

1 (c) LIMITS ON LIABILITY.—(1) GENERAL RULE.—The
2 total of the liability of a responsible party under subsection
3 (a) and any removal costs incurred by, or on behalf of, the
4 responsible party with respect to each incident shall not
5 exceed—

6 (A) \$500 per gross ton or \$5,000,000, whichever
7 is greater (but not to exceed \$78,000,000), for any
8 tanker;

9 (B) \$300 per gross ton or \$500,000, whichever is
10 greater, for any other vessel; or

11 (C) \$75,000,000 for any facility.

12 (2) EXCEPTIONS.—(A) PROXIMATE CAUSE.—Para-
13 graph (1) shall not apply if the incident was proximately
14 caused by—

15 (i) willful misconduct within the privity and
16 knowledge of the responsible party; or

17 (ii) a violation, within the privity and knowledge
18 of the responsible party, of applicable Federal safety,
19 construction, or operating regulations.

20 (B) FAILURE OR REFUSAL OF RESPONSIBLE PARTY.—
21 Paragraph (1) shall not apply if the responsible party fails or
22 refuses—

23 (i) to report the incident where required by law
24 and the responsible party knows or has reason to know
25 of the incident; or

1 (ii) to provide all reasonable cooperation and as-
2 sistance requested by a responsible official in connec-
3 tion with removal activities.

4 (3) ADJUSTING LIMITS OF LIABILITY.—(A) FACILI-
5 TIES.—The Secretary, and with respect to Outer Continental
6 Shelf facilities the Secretary and the Secretary of the Depart-
7 ment of the Interior, is authorized to establish by regulation,
8 with respect to any class or category of facility a maximum
9 limit of liability under this section of less than \$75,000,000,
10 but not less than \$8,000,000, taking into account the size,
11 storage capacity, oil throughput, proximity to sensitive areas,
12 type of oil handled, history of discharges, and other factors
13 relevant to risks posed by the class or category of facility.

14 (B) PERIODIC REPORTS.—The Secretary shall, from
15 time to time, report to the Congress on the desirability of
16 adjusting the limits of liability specified in paragraph (1) of
17 this subsection.

18 (d) LIABILITY FOR INTEREST.—(1) GENERAL RULE.—
19 The responsible party or his guarantor shall be liable to the
20 claimant for interest on the amount paid in satisfaction of a
21 claim under this section for the period described in paragraph
22 (2).

23 (2) PERIOD.—(A) IN GENERAL.—Except as provided in
24 subparagraph (B), the period for which interest shall be paid
25 under paragraph (1) is the period beginning on the date on

1 which removal costs are incurred and, for damages on the
2 date on which the claim is presented to the responsible party,
3 or guarantor, and ending on the date on which the claimant
4 is paid, inclusive.

5 (B) EXCLUSION OF PERIOD DUE TO OFFER BY GUAR-
6 ANTOR.—If the responsible party or guarantor offers to the
7 claimant an amount equal to or greater than that finally paid
8 in satisfaction of the claim, the period described in subpara-
9 graph (A) shall not include the period beginning on the date
10 such offer is made and ending on the date such offer is ac-
11 cepted. If such offer is made within sixty days after the date
12 upon which the claim is presented pursuant to section 104(a),
13 the period described in subparagraph (A) shall not include
14 any period before such offer is accepted.

15 (C) EXCLUSION OF PERIODS IN INTEREST OF JUS-
16 TICE.—The period described in paragraph (A) shall not in-
17 clude any period—

18 (i) during which a claimant is not paid due to rea-
19 sons beyond the control of the responsible party; and

20 (ii) if it would not serve the interest of justice to
21 include such period.

22 (D) CALCULATION OF INTEREST.—The interest paid
23 under this subsection shall be calculated at the average of the
24 highest rate for commercial and finance company paper of
25 maturities of one hundred and eighty days or less obtaining

1 on each of the days included within the period for which in-
2 terest must be paid to the claimant, as published in the Fed-
3 eral Reserve bulletin.

4 (E) INTEREST NOT SUBJECT TO LIABILITY LIMITS.—
5 Interest under this paragraph shall be in addition to damages
6 for which claims may be asserted under section 102 and shall
7 be paid without regard to any limitation of liability under
8 subsection (c)(1) of this section. The payment of interest
9 under this subsection by a guarantor shall be subject to sec-
10 tion 107(e).

11 (e) NATURAL RESOURCES.—(1) LIABILITY.—In the
12 case of an injury to, destruction of, or loss of natural re-
13 sources under this section, liability shall be—

14 (A) to the United States Government for natural
15 resources belonging to, managed by, controlled by, or
16 appertaining to the United States,

17 (B) to any State for natural resources within the
18 State or belonging to, managed by, controlled by, or
19 appertaining to such State, and

20 (C) to any Indian tribe for natural resources be-
21 longing to, managed by, or appertaining to such tribe.

22 (D) where subsection (f) of this section applies, to
23 the government of a foreign country for natural re-
24 sources belonging to, managed by, controlled by, or ap-
25 pertaining to such country.

1 (2) DESIGNATION OF TRUSTEES.—(A) IN GENERAL.—

2 The President or the authorized representative of any Indian
3 tribe, or the authorized representative of any State or of the
4 foreign government, shall act on behalf of the public or
5 Indian tribe as trustee of such natural resources to recover
6 restoration costs.

7 (B) FEDERAL TRUSTEES.—The President shall designate the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act. Such officials shall develop and adopt a plan for the reasonable restoration or replacement of, or the reasonable acquisition of the equivalent of their resources under their trusteeship that have been injured, destroyed, or lost as a result of a discharge of oil and may upon request of and reimbursement from a State or Indian tribe and at the Federal official's discretion develop and adopt such a plan for those natural resources under the State's or tribe's trusteeship.

18 (C) STATE TRUSTEES.—The Governor of each State shall designate State officials who may act on behalf of the public as trustee for natural resources under this Act and shall notify the President of such designations. Such officials shall develop and adopt a plan for the reasonable restoration or replacement of, or the reasonable acquisition of the equivalent of those natural resources under the trusteeship.

1 (D) NOTICE AND OPPORTUNITY TO BE HEARD.—Plans
2 shall be developed and adopted under subparagraphs (B) and
3 (C) only after the plans have been made public and the public
4 has had an opportunity to submit written comments on the
5 plans. Such a hearing shall not constitute an adjudication
6 under section 504 and the United States Code.

7 (E) INDIAN TRIBAL TRUSTEES.—The governing body
8 of any Indian tribe shall designate tribal officials who may
9 act on behalf of the tribe and its members as trustee for natu-
10 ral resources under this Act and shall notify the President of
11 such designations. Such officials shall develop and adopt a
12 plan for the reasonable restoration or replacement, or the
13 reasonable acquisition of the equivalent of those natural re-
14 sources under the trusteeship.

15 (3) DETERMINATION OF COSTS.—(A) IN GENERAL.—
16 The measure of costs in any action under this section for
17 injury to, destruction of, or loss of natural resources shall be
18 limited to the sums necessary for the reasonable restoration
19 or replacement of the natural resources, or reasonable acqui-
20 sition of equivalent natural resources, so injured, destroyed,
21 or lost. Monetary value of the loss of use of injured, de-
22 stroyed, or lost natural resources may be recovered from per-
23 sons liable under and in accordance with section 102 of this
24 Act, but not from the Fund.

1 (B) DETERMINE COSTS WITH RESPECT TO PLANS.—

2 Costs shall be determined under subparagraph (A) with re-
3 spect to plans adopted under paragraphs (2) (B) and (C).

4 (C) NO DOUBLE RECOVERY.—There shall be no double
5 recovery under this Act for natural resources restoration
6 costs, including the costs of restoration assessment, restora-
7 tion, replacement, or equivalent acquisition for the same inci-
8 dent and natural resource.

9 (4) USE OF RECOVERED SUMS.—Sums recovered by the
10 United States Government or a State or Indian tribe as trust-
11 ee under this subsection shall be retained by the trustee, for
12 use only to perform restoration assessment or reimburse
13 trustees for funds expended for removal, restoration assess-
14 ment, restoration, replacement, or acquisition of the equiva-
15 lent of such natural resources. Sums recovered on the basis of
16 the loss of use of injured, destroyed, or lost natural resources
17 shall be used for the general enhancement of the ecosystem
18 of which the injured, destroyed, or lost natural resources
19 were a part, for the purpose of restoring and maintaining the
20 chemical, physical, and biological integrity of the affected
21 ecosystem.

22 (5) CIVIL PENALTY.—This paragraph applies to cases
23 in which, as the result of an incident, natural resources,
24 which cannot be restored or replaced and for which no equiv-
25 alent may be acquired, are destroyed by oil pollution. In such

1 a case the President or authorized representative of a State
2 or Indian tribe, acting under this subsection as trustee, may
3 request the Attorney General to bring an action in court to
4 recover from the responsible party, or person in charge of
5 the vessel, or facility, a civil penalty of no more than
6 \$10,000,000 which shall be separate from and in addition to
7 any liability of the responsible party for the incident under
8 section 102(c) of this Act. In determining the amount of civil
9 penalty the court shall consider, inter alia, any culpability of
10 the responsible party, or person in charge, any economic ben-
11 efit derived by the responsible party, or person in charge, in
12 connection with the incident, the uniqueness of the natural
13 resource destroyed, and the nature and extent of any efforts
14 taken by the responsible party, or person in charge, to pre-
15 vent the destruction of the natural resource. No penalty may
16 be imposed under this paragraph which is inconsistent with
17 international law. Recoveries under this paragraph shall be
18 paid to the trustee to be used for the general enhancement of
19 the ecosystem of which the destroyed natural resource was a
20 part, for the purpose of restoring and maintaining the chemi-
21 cal, physical, and biological integrity of the affected ecosys-
22 tem. Any determination made by a trustee under this subsec-
23 tion that a natural resource has been destroyed and that it
24 cannot be restored or replaced, and no equivalent for it may

1 be acquired shall be within the complete and unreviewable
2 discretion of the trustee.

3 (f) RECOVERY BY FOREIGN CLAIMANTS.—(1) IN GEN-
4 ERAL.—A foreign claimant may only recover costs and dam-
5 ages under this Act in accordance with this subsection.

6 (2) COVERED DISCHARGES.—A foreign claimant may
7 recover only if the discharge of oil was from—

8 (A) a facility,

9 (B) a vessel in the navigable waters of the United
10 States, or

11 (C) a tanker that received oil at the terminal of
12 the pipeline constructed under the Trans-Alaska Pipe-
13 line Authorization Act for transportation to a port in
14 the United States, the incident having occurred prior to
15 offloading at such port, and resulted in the presence of
16 oil in or on the territorial sea, internal waters, or adja-
17 cent shoreline of a foreign country.

18 (3) REQUIREMENTS.—A foreign claimant may only re-
19 cover if—

20 (A) the claimant first seeks compensation under
21 title III;

22 (B) the claimant has not been otherwise compen-
23 sated for the costs or damages; and

24 (C) recovery is authorized by a treaty or execu-
25 tive agreement between the United States and the

1 claimant's country, or the Secretary of State, in con-
2 sultation with the Attorney General and other appro-
3 priate officials, has certified that the claimant's country
4 provides a comparable remedy for United States'
5 claimants.

6 (4) EXCEPTION FOR CANADIAN CLAIMANTS RESPECT-
7 ING TRANS-ALASKA PIPELINE OIL.—Paragraph (3)(C) shall
8 not apply with respect to recovery by a resident of Canada in
9 the case of an incident described in paragraph (2)(C).

10 (5) DEFINITION OF FOREIGN CLAIMANT.—For pur-
11 poses of this subsection, the term "foreign claimant" means
12 any person residing in a foreign country, the government of a
13 foreign country, or any agency or political subdivision
14 thereof.

15 (g) RECOVERY OF REMOVAL COSTS BY RESPONSIBLE
16 PARTY.—(1) IN GENERAL.—The responsible party for a
17 vessel or facility from which oil is discharged, or which posed
18 the substantial threat of a discharge of oil, may assert a claim
19 against the Fund for removal costs consistent with the Na-
20 tional Contingency Plan under subsection (a) only if he can
21 show that—

22 (A) he is entitled to a defense to liability under
23 subsection (b), or

24 (B) he is entitled to a limitation of liability under
25 subsection (c) and has exceeded that limitation.

1 (2) EXTENT OF RECOVERY.—A responsible party who
2 is entitled to a limitation of liability, may assert a claim
3 against the Fund under paragraph (1) of subsection (a) only
4 to the extent that the sum of the removal costs incurred by
5 the responsible party plus the amounts paid by the responsi-
6 ble party or by the guarantor on behalf of the responsible
7 party for claims asserted under subsection (a) exceeds the
8 amount to which the total of the liability under subsection (a)
9 and removal costs incurred by, or on behalf of, the responsi-
10 ble party is limited under subsection (c).

11 (h) CONTRIBUTION.—A person including a responsible
12 party may bring an action for contribution against any other
13 person, not to include the United States, who is liable or
14 potentially liable under this section. Such an action shall be
15 brought in accordance with section 108.

16 (i) INDEMNIFICATION AGREEMENTS.—(1) IN GENER-
17 AL.—No indemnification, hold harmless, or similar agree-
18 ment or conveyance shall be effective to transfer the liability
19 imposed under this section from the responsible party for any
20 vessel or facility or from any person who may be liable for an
21 incident under this section to any other person. Nothing in
22 this subsection shall bar any agreement to insure, hold harm-
23 less, or indemnify a party to such agreement for any liability
24 under this section.

1 (2) RELATIONSHIP TO OTHER CAUSES OF ACTION.—

2 Nothing in this Act, including the provisions of paragraph (1)
3 of this subsection, shall bar a cause of action that a responsi-
4 ble party subject to liability under this section, or a guaran-
5 tor, has or would have, by reason of subrogation or otherwise
6 against any person.

7 SEC. 103. USES OF THE FUND.

8 (a) IN GENERAL.—The Fund shall be available to the
9 Secretary without further appropriations for—

10 (1) the cost of carrying out subsections (c), (d), (i),
11 and (l) of section 311 of the Federal Water Pollution
12 Control Act, and sections 5 and 7 of the Intervention
13 on the High Seas Act, and the reasonable costs in-
14 curred by the President, a Governor of a State, or
15 equivalent representative of any Indian Tribe as
16 trustee in assessing damaged natural resources and
17 preparing a restoration and acquisition plan;

18 (2) the payment of recoverable costs described in
19 section 102(a)(2) not otherwise compensated under this
20 Act;

21 (3) the payment of Federal administrative, person-
22 nel, and enforcement costs and expenses, including
23 audits of the Fund, reasonably necessary for and inci-
24 dental to the administration and implementation of this

1 Act, the cost of providing equipment, and other costs
2 for functions related to pollution response, and

3 (4) the payment of all contributions to the Inter-
4 national Fund under title III of this Act necessary to
5 comply with United States treaty obligations.

6 (b) CLAIMS NOT COVERED BY THE FUND.—The Fund
7 shall not be available to pay any claim for costs—

8 (1) as to a particular claimant, if the incident of
9 oil or economic loss is caused, in whole or in part, by
10 the gross negligence or willful misconduct of that
11 claimant;

12 (2) as to a particular claimant, to the extent
13 that the incident is caused by the negligence of that
14 claimant;

15 (3) as to a claim for removal costs by a responsi-
16 ble party who is not entitled to assert such a claim
17 under subsection (g) of section 102; or

18 (4) as to a claim by the United States, where the
19 negligence of the United States is the sole cause of the
20 discharge.

21 (c) MAXIMUM AMOUNT PAYABLE FROM FUND.—The
22 maximum amount which may be paid from the Fund with
23 respect to any incident in combination with payment, if any,
24 under the International Convention on the Establishment of
25 an International Fund for Compensation of Oil Pollution

1 Damage, 1984, shall not exceed \$500,000,000. Notwith-
2 standing any other provision of law, the President is author-
3 ized to waive the limit imposed by this subsection and to
4 prescribe a higher limit upon a determination that such a
5 waiver is necessary and in the best interests of the country.

6 (d) FEDERAL, STATE, AND TRIBAL OFFICIALS WHO
7 MAY OBLIGATE FROM THE FUND.—The Secretary is au-
8 thorized to promulgate regulations setting up an advancing
9 arrangement where one or more Federal officials are desig-
10 nated who may obligate money in the Fund in accordance
11 with subsection (a) of this section or portions thereof. The
12 Secretary is also authorized to delegate to officials of a State
13 with an adequate program operating under a cooperative
14 agreement with the Federal Government the authority to
15 decide to obligate money in the Fund and to settle claims:
16 *Provided*, That before any such decision becomes legally ef-
17 fective, it must be approved by the Secretary or a Federal
18 official designated pursuant to this subsection.

19 (e) DRAWS BY STATE AND INDIAN TRIBAL OFFI-
20 CIALS.—(1) ADVANCES, FINANCING AGREEMENTS.—Pursu-
21 ant to regulations promulgated under this subsection, the
22 Secretary shall issue letters of credit, guarantees, or similar
23 financing to each State or tribal governing body for the pur-
24 poses of this subsection. All sums advanced under this sub-
25 section shall be paid from the Fund. No sums may be ad-

1 vanced or provided under any financing agreement for the
2 purposes of this subsection from any source other than the
3 Fund, and the United States shall not be liable for such sums
4 other than in accordance with this subsection and the regula-
5 tions promulgated hereunder.

6 (2) IMMEDIATE DRAW.—Regulations promulgated
7 under this subsection shall authorize without any prior condi-
8 tion the Governor of each State or tribal governing body or
9 appropriate tribal official designated by a governing tribal
10 body, or an appropriate State official designated by the Gov-
11 ernor, to obligate sums advanced or provided under any fi-
12 nancing agreement in an amount not to exceed \$50,000 for
13 removal costs required for the immediate response to a dis-
14 charge or substantial threat of a discharge of oil into or upon
15 the navigable waters or adjacent shorelines.

16 (3) NOTIFICATION, ADDITIONAL SUM.—A Governor or
17 designee or tribal governing body or designee exercising the
18 authority granted by regulations pursuant to paragraph (2) of
19 this subsection shall notify the Secretary within twenty-four
20 hours of any obligation made thereunder. The regulations
21 promulgated under this subsection shall prescribe means by
22 which additional sums may be provided to the Governor, or
23 appropriate State official, tribal governing body, or appropri-
24 ate tribal official, for removal costs required for further re-

1 sponse to the discharge or the substantial threat of a dis-
2 charge. Such sums may be provided as necessary.

3 (4) REGULATIONS.—Not later than one year after the
4 date of the enactment of this Act, the Secretary shall publish
5 proposed regulations detailing, inter alia, the manner in
6 which advances and financing agreements are to be made
7 under this subsection.

8 (f) RIGHTS OF SUBROGATION.—Payment of any claim
9 by the Fund under this Act shall be subject to the United
10 States Government acquiring by subrogation all rights of the
11 claimant to recover from the responsible party, third party,
12 and guarantor. In addition, the Fund may recover, in accord-
13 ance with sections 102 and 107, any removal costs, restora-
14 tion costs, and restoration assessment costs paid directly by
15 the Fund from the responsible party, third party, and
16 guarantor.

17 (g) AUDIT.—The Inspector General of the Department
18 of Transportation shall audit all payments, obligations, reim-
19 bursements, or other uses of the Fund in the prior fiscal year,
20 to assure that the Fund is being properly administered and
21 that claims are being appropriately and expeditiously consid-
22 ered. The Inspector General shall submit to the Congress the
23 results of the audits required under this subsection. Each
24 Federal agency shall cooperate with the Inspector General in
25 carrying out this subsection.

1 (h) PERIOD OF LIMITATIONS FOR CLAIMS.—(1) RE-
2 MOVAL COSTS.—No claim may be presented under this sec-
3 tion for recovery of removal costs unless the claim is present-
4 ed within three years after the date of completion of all re-
5 moval action.

6 (2) RESTORATION COSTS OR DAMAGES.—No claim
7 may be presented under this section for restoration costs or
8 damages unless the claim is presented within three years
9 after the date on which the injury necessitating such restora-
10 tion costs and its connection with the discharge in question
11 were reasonably discoverable with the exercise of due care,
12 or upon the completion of the natural resource damage as-
13 sessments or, with respect to restoration costs if later and to
14 the extent applicable, the date on which final regulations are
15 promulgated under section 102(e)(2)(D) of this Act.

16 (i) LIMITATION ON PAYMENT FOR SAME COSTS.—
17 Where the Secretary has paid an amount out of the Fund for
18 any costs specified under subsection (a), no other claim may
19 be paid out of the Fund for the same costs or damages.

20 (j) OBLIGATION IN ACCORDANCE WITH PLAN.—(1) IN
21 GENERAL.—Except as provided in paragraph (2), amounts
22 may be obligated from the Fund for the restoration, or re-
23 placement, or acquisition of natural resources only in accord-
24 ance with a plan adopted under section 102(e)(2).

1 (2) EXCEPTION.—Paragraph (1) shall not apply to costs
2 incurred in connection with a situation requiring action to
3 avoid irreversible loss of natural resources or to prevent or
4 reduce any continuing danger to natural resources or similar
5 need for emergency action.

6 (k) RECOVERY FOR WRONGFUL PAYMENT.—Without
7 regard to whether a prosecution is brought under section
8 1001 of title 18, United States Code, the Fund shall be enti-
9 tled to recover moneys paid to a claimant. Where an action is
10 brought under this subsection the court may, in addition to
11 moneys so paid, award the Fund administrative costs in-
12 curred respecting such claim and interest on such moneys so
13 paid.

14 (l) AUTHORITY TO BORROW.—(1) Notwithstanding
15 section 9509(d) of the Internal Revenue Code of 1954, as
16 revised, the Secretary of the Treasury shall, at the request of
17 the Secretary, advance such sums to the Fund in such
18 amount and at such times as are as necessary: *Provided*, That
19 amounts advanced shall not be greater than \$500,000,000;
20 *Provided further*, That the aggregate amount of repayable
21 advances to the Oilspill Liability Trust Fund which is out-
22 standing at any one time shall not exceed \$500,000,000;
23 *And provided further*, That such advances shall be repaid
24 with interest on or before five years from the date the ad-
25 vance is received into the Oilspill Liability Trust Fund.

1 (2) Advances made pursuant to this subsection shall be
2 repaid, and interest on such advances shall be paid, to the
3 general fund of the Treasury. Such interest shall be at rates
4 computed in the same manner as provided in section
5 102(d)(2)(D) and shall be compounded annually.

6 (3) INVESTMENT.—It shall be the duty of the Secretary
7 of the Treasury to invest such portion of the Fund as is not,
8 in his or her judgment, required to meet current withdrawals.
9 Such investments shall be in public debt securities with matu-
10 rities suitable for the needs of such Fund and bearing interest
11 at rates determined by the Secretary, taking into consider-
12 ation current market yields on outstanding marketable obliga-
13 tions of the United States of comparable maturities. The
14 income on such investments shall be credited to and form a
15 part of such Fund.

16 SEC. 104. CLAIMS PROCEDURE.

17 (a) PRESENTATION TO RESPONSIBLE PARTY OR
18 GUARANTOR.—Except as provided in subsection (b), all
19 claims against the Fund for costs shall be presented first to
20 all responsible parties, and the guarantor of the source desig-
21 nated under section 105(a). In a case where liability is deter-
22 mined in accordance with section 302, such claims shall be
23 presented first to the ship's owner (as defined in section
24 301(1)) and to the international fund (as described in section
25 301(5)).

1 (b) PRESENTATION TO FUND.—Claims for costs may be
2 presented first to the Fund—

3 (1) by a responsible party who may assert a claim
4 under section 102(g);

5 (2) by the Governor of a State or Indian tribal
6 governing body for removal costs incurred by that
7 State; or

8 (3) by a United States claimant in a case where a
9 foreign offshore unit has discharged oil causing costs
10 for which the Fund is liable under section 103(a)(2).

11 (c) ELECTION.—If a claim is presented in accordance
12 with subsection (a) and—

13 (1) each person to whom the claim is presented
14 denies all liability for the claim, or

15 (2) the claim is not settled by any person by pay-
16 ment within one hundred and eighty days after the
17 date upon which (A) the claim was presented, or (B)
18 advertising was begun pursuant to section 105(b),
19 whichever is later, the claimant may elect to com-
20 mence an action in court against the responsible part
21 or guarantor or to present the claim to the Fund.

22 (d) UNCOMPENSATED COSTS.—If a claim is presented
23 in accordance with subsection (a) and full and adequate com-
24 pensation is unavailable, either because the claim exceeds a
25 limit of liability invoked under section 102 or because the

1 responsible party and his guarantor are financially incapable
2 of meeting their obligations in full, a claim for the uncompen-
3 sated costs may be presented to the Fund.

4 (e) PROCEDURE FOR CLAIMS AGAINST THE FUND.—
5 The Secretary may deny, compromise, or pay in full any
6 claim against the Fund. The Secretary shall promulgate, and
7 may from time to time, amend, regulations for the presenta-
8 tion, filing, processing, settlement, and adjudication of claims
9 under this Act against the Fund, including but not limited to
10 the prioritization of claims if necessary. No action shall be
11 commenced against the Fund prior to the expiration of the
12 period prescribed by the Secretary by regulation for the ex-
13 haustion of administrative remedies against the Fund.

14 (f) PENDENCY OF ACTION.—No claim against the Fund
15 may be paid during the pendency of an action by a claimant
16 in court to recover costs which are the subject of the claim.

17 (g) PROVIDING COPIES OF COMPLAINTS.—Whenever
18 any action is brought under this chapter in a court of the
19 United States by a plaintiff other than the United States, the
20 plaintiff shall provide a copy of the complaint to the Attorney
21 General of the United States and the Fund Administrator.

22 SEC. 105. DESIGNATION AND ADVERTISEMENT.

23 (a) DESIGNATION OF SOURCE AND NOTIFICATION.—
24 When the Secretary receives information of an incident, he or
25 she shall, where possible and appropriate, designate the

1 source or sources of the discharge. If a designated source is a
2 vessel or a facility, the Secretary shall immediately notify
3 the responsible party and the guarantor, if known, of that
4 designation.

5 (b) ADVERTISEMENT BY THE RESPONSIBLE PARTY OR
6 GUARANTOR.—If a responsible party or guarantor fails to
7 inform the Secretary, within five days after receiving notifi-
8 cation of a designation under subsection (a), of denial of the
9 designation, such party or guarantor shall advertise the des-
10 ignation and the procedures by which claims may be present-
11 ed to such party or guarantor, in accordance with regulations
12 promulgated by the Secretary. Advertisement under the pre-
13 ceding sentence shall begin no later than fifteen days after
14 the date of the designation made under subsection (a). If ad-
15 vertisement is not otherwise made in accordance with this
16 subsection, the Secretary shall promptly and at the expense
17 of the responsible party or the guarantor involved, advertise
18 the designation and the procedures by which claims may be
19 presented to the responsible party or guarantor. Advertise-
20 ment under this subsection shall continue for a period of no
21 less than thirty days.

22 SEC. 106. SUBROGATION.

23 (a) IN GENERAL.—Any person, including the Fund,
24 who pays compensation pursuant to this Act to any claimant
25 for costs, and interest shall be subrogated to all rights,

1 claims, and causes of action that the claimant has under this
2 Act.

3 (b) ACTIONS ON BEHALF OF THE FUND.—Upon re-
4 quest of the Secretary, the Attorney General may commence
5 an action on behalf of the Fund to recover the amount of any
6 compensation paid by the Fund to any claimant pursuant to
7 this Act, and all expenses incurred by the Fund by reason of
8 the claim, including interest (including prejudgment interest),
9 administrative and adjudicative costs, and attorney's fees.
10 Such an action may be commenced against any responsible
11 party or (subject to section 107(e)) guarantor, or any other
12 person who is liable, pursuant to any law, to the compensat-
13 ed claimant or to the Fund, for the costs for which the com-
14 pensation was paid. Such an action shall be commenced
15 against the responsible foreign government or other responsi-
16 ble party to recover any costs paid from the Fund as the
17 result of the discharge or substantial threat of discharge, of
18 oil from a foreign offshore unit.

19 (c) ADMINISTRATIVE COST RECOVERY SETTLEMENT
20 AUTHORITY.—The Secretary may consider, compromise,
21 and settle a claim for removal or resource assessment costs
22 incurred by the United States Government or any claim ac-
23 quired by the Fund through subrogation under this Act, if the
24 claim has not been referred to the Department of Justice for
25 further action. In the case of any incident where the total

1 claims of the fund exceed \$500,000 (excluding interest), any
2 claims referred to in the preceding sentence may be compro-
3 mised and settled only with the prior written approval of the
4 Attorney General.

5 SEC. 107. FINANCIAL RESPONSIBILITY.

6 (a) VESSELS.—(1) REQUIREMENT.—The responsible
7 party for any vessel over three hundred gross tons (except a
8 non-self-propelled vessel that does not carry oil as cargo or
9 fuel), using any port or place in the United States or the
10 navigable waters or any offshore facility shall establish and
11 maintain, in accordance with regulations promulgated by the
12 Secretary, evidence of financial responsibility sufficient to
13 meet the maximum amount of liability to which, in the case
14 of a tanker, the responsible party could be subjected under
15 section 102(c)(1)(A) of this Act, or to which, in the case of
16 any other vessel, the responsible party could be subjected
17 under section 102(c)(1)(B) of this Act, in a case where the
18 responsible party would be entitled to limit liability under
19 that section. If the responsible party owns or operates more
20 than one vessel requiring evidence of financial responsibility,
21 such evidence shall be established for all such vessels but in
22 an amount sufficient only to meet the maximum liability ap-
23 plicable to the largest of such vessels.

24 (2) WITHHOLDING CLEARANCE.—The Secretary of the
25 Treasury shall withhold or revoke the clearance required by

1 section 4197 of the Revised Statutes of the United States of
2 any vessel subject to this subsection that does not have the
3 certification required under this subsection.

4 (3) DENYING ENTRY TO OR DETAINING VESSELS.—The
5 Secretary may (A) deny entry to any offshore facility or any
6 port or place in the United States, or to the navigable waters,
7 or (B) detain at such a facility or port or place, any vessel
8 that, upon request, does not produce the certification required
9 under this subsection or the regulations issued under this sub-
10 section.

11 (b) OFFSHORE FACILITIES.—The responsible party
12 with respect to an offshore facility shall establish and main-
13 tain evidence of financial responsibility sufficient to meet the
14 maximum amount of liability to which the responsible party
15 could be subjected under section 102 of this Act in a case
16 where the responsible party would be entitled to limit liability
17 under that section. In cases where a person is the responsible
18 party for more than one facility subject to this subsection,
19 evidence of financial responsibility need be established only in
20 an amount sufficient to meet the maximum liability applicable
21 to any one facility with the highest liability.

22 (c) METHODS OF FINANCIAL RESPONSIBILITY.—Fi-
23 nancial responsibility under this section may be established
24 by any one, or by any combination, of the following methods,
25 which the Secretary determines to be acceptable: evidence of

1 insurance, surety bond, guarantee, qualification as a self-in-
2 surer, or other evidence of financial responsibility acceptable
3 to the Secretary. Any bond filed shall be issued by a bonding
4 company authorized to do business in the United States. In
5 promulgating requirements under this section, the Secretary
6 is authorized to specify policy or other contractual terms,
7 conditions, or defenses which are necessary, or which are
8 unacceptable, in establishing such evidence of financial re-
9 sponsibility in order to effectuate the purposes of this Act.

10 (d) CLAIMS AGAINST GUARANTOR.—Any claim for
11 which liability may be established under section 102 of this
12 Act may be asserted directly against any guarantor providing
13 evidence of financial responsibility for a responsible party, or
14 a third party, liable under that section for costs and damages
15 to which the claim pertains. In defending against such a
16 claim, the guarantor may invoke all rights and defenses
17 which would be available to the responsible party under sec-
18 tion 102.

19 (e) LIMITATION ON GUARANTOR'S LIABILITY.—The
20 total liability of any guarantor in a direct action suit brought
21 under this section shall be limited to the aggregated amount
22 of the monetary limits of the policy of insurance, guarantee,
23 surety bond, or similar instrument obtained from the guaran-
24 tor by the person subject to liability. Nothing in this subsec-

1 tion shall be construed, interpreted, or applied to diminish the
2 liability of any person under this Act or any other law.

3 (f) CIVIL PENALTY.—(1) IN GENERAL.—Any person
4 who, after notice and an opportunity for a hearing, is found to
5 have failed to comply with the requirements of this section or
6 the regulations issued under this section, or with a denial or
7 detention order issued under subsection (a)(3) of this section,
8 shall be liable to the United States for a civil penalty, not to
9 exceed \$25,000 per day of each violation. The amount of the
10 civil penalty shall be assessed by the Secretary by written
11 notice. In determining the amount of the penalty, the Secre-
12 tary shall take into account the nature, circumstances,
13 extent, and gravity of the violation, the degree of culpability,
14 any history of prior violation, ability to pay, and such other
15 matters as justice may require. The Secretary may compro-
16 mise, modify, or remit, with or without conditions, any civil
17 penalty which is subject to imposition or which has been im-
18 posed under this paragraph. If any person fails to pay an
19 assessed civil penalty after it has become final, the Secretary
20 may refer the matter to the Attorney General for collection.

21 (2) JUDICIAL RELIEF.—In addition to, or in lieu of, as-
22 sessing a penalty under paragraph (1) of this subsection, the
23 Secretary may request the Attorney General to secure such
24 relief as necessary to compel compliance with this section,
25 including, but not limited to, a judicial order terminating op-

1 erations. The district courts of the United States shall have
2 jurisdiction to grant such relief as the public interest and the
3 equities of the case may require.

4 (3) REVIEW OF CIVIL PENALTY.—Any person against
5 whom a civil penalty is assessed under this section may
6 obtain review thereof on the record in the appropriate court
7 of the United States by filing a complaint in such court within
8 thirty days from the date it becomes final under paragraph (1)
9 of this subsection. The Secretary shall promptly file in such
10 court a certified copy of the record upon which such violation
11 was found and such penalty imposed. The findings and order
12 of the Secretary shall be set aside by such court only if they
13 are not found to be supported by substantial evidence, as pro-
14 vided in section 706(2) of title 5.

15 (4) ACTION UPON FAILURE TO PAY ASSESSMENT.—If
16 any person fails to pay an assessment of a civil penalty after
17 it has become final, or after the appropriate court has entered
18 final judgment in favor of the Secretary, the Secretary shall
19 refer the matter to the Attorney General of the United
20 States, who shall recover the amount assessed in any appro-
21 priate district court of the United States. In such action, the
22 validity and appropriateness of the final assessment shall not
23 be subject to review.

24 (g) CONTINUATION OF REGULATIONS.—Any regula-
25 tion respecting financial responsibility, which has been issued

1 pursuant to any provision of law repealed or superseded by
2 this Act, and which is in effect on the date immediately pre-
3 ceding the effective date of this Act, shall be deemed and
4 construed to be a regulation issued pursuant to this section.
5 Such a regulation shall remain in full force and effect unless
6 and until superseded by new regulations issued under this
7 section.

8 (h) UNIFIED CERTIFICATE.—The Secretary may issue
9 one certificate of financial responsibility for purposes of this
10 Act and the Comprehensive Environmental Response, Com-
11 pensation, and Liability Act of 1980.

12 SEC. 108. LITIGATION, JURISDICTION, AND VENUE.

13 (a) REVIEW OF REGULATIONS.—Review of any regula-
14 tion promulgated under this Act may be had upon application
15 by any interested person only in the circuit court of Appeals
16 of the United States for the District of Columbia. Any such
17 application shall be made within ninety days from the date of
18 promulgation of such regulations.

19 (b) JURISDICTION.—Except as provided in subsection
20 (a) of this section, the United States district courts shall have
21 original and exclusive jurisdiction over all causes of action
22 arising under this Act (which shall be deemed to include ac-
23 tions under the International Convention on Civil Liability
24 for Oil Pollution Damages, 1984, and the International Con-
25 vention on the Establishment of an International Fund for

1 Compensation for Oil Pollution Damage, 1984), without
2 regard to the citizenship of the parties or the amount in
3 controversy.

4 (c) VENUE.—Venue shall lie in any district in which the
5 incident, injury, or damages occurred, or in which the defend-
6 ant resides, may be found, has its principal office, or has ap-
7 pointed an agent for services of process. For the purposes of
8 this section, the Fund and the International Fund, estab-
9 lished under article 2 of the International Convention on the
10 Establishment of an International Fund for Compensation for
11 Oil Pollution Damage, 1984, shall reside in the District of
12 Columbia.

13 (d) SAVINGS PROVISION.—Nothing in this Act shall
14 affect any action commenced before the date of enactment of
15 this Act.

16 (e) PERIOD OF LIMITATIONS.—(1) DAMAGES FOR
17 ECONOMIC LOSS.—Except as provided in paragraphs (3) and
18 (4), an action may not be commenced for damages for eco-
19 nomic loss under this Act, unless that action is commenced
20 within three years after the date on which the injury result-
21 ing in the damages and its connection with the discharge in
22 question were reasonably discoverable with the exercise of
23 due care.

1 (2) REMOVAL COSTS AND RESTORATION COSTS.—

2 Except as provided in paragraphs (3) and (4), an action may
3 not be commenced—

4 (A) for claims for the recovery of removal costs
5 under this Act, unless the action is commenced within
6 three years after the date of completion of all removal
7 action, which was instituted and completed within a
8 reasonable time following the incident.

9 (B) for claims for the recovery of restoration costs
10 under this Act, unless that action is commenced within
11 three years after the date on which the injury necessi-
12 tating such restoration costs and its connection with
13 the discharge in question were reasonably discoverable
14 with the exercise of due care or with respect to resto-
15 ration costs if later and to the extent applicable, the
16 date on which final regulations are promulgated under
17 section 102(e)(2)(D) of this Act.

18 An action may be commenced under section 102 for recovery
19 of removal or restoration costs at any time after such costs
20 have been incurred but prior to the conclusion of the time
21 periods set out under clauses (A) and (B) of this paragraph.

22 (3) ACTIONS FOR CONTRIBUTION.—An action may not
23 be commenced for contribution for any costs or damages
24 unless that action is commenced within three years after—

1 (A) the date of judgment in any action under this
2 Act for recovery of such costs or damages, or

3 (B) the date of entry of a judicially approved set-
4 tlement with respect to such costs or damages.

5 (4) SUBROGATION.—An action based on rights subro-
6 gated pursuant to this Act by reason of payment of a claim
7 may not be commenced under this Act unless that action is
8 commenced within three years after the date of payment of
9 such claim.

10 SEC. 109. RELATIONSHIP TO OTHER LAW.

11 (a) LIABILITY REGIMES.—(1) Except as provided under
12 section 302 of this Act, the cause of action established under
13 section 111 of this title may be brought in the appropriate
14 district court of the United States, as provided in section 108
15 of this title.

16 (2) No action for costs or damages arising out of an
17 accident may be brought in any State court. No action for
18 costs or damages arising out of an incident may be brought in
19 any Federal court except as provided in this Act.

20 (b) NO PREEMPTION OF STATE FUNDS.—Nothing in
21 this title or section 9509 of the Internal Revenue Code of
22 1954 shall affect the authority of any State to establish or
23 continue in effect, and to require any person to contribute to
24 a fund, a purpose of which is to pay for costs or damages
25 arising out of or directly resulting from an incident.

1 (c) NO PREEMPTION OF CIVIL PENALTIES.—Nothing
2 in this Act or section 9509 of the Internal Revenue Code of
3 1954 shall affect the authority of the United States or any
4 State or political subdivision thereof to impose, or to deter-
5 mine the amount of, any fine or penalty for any violation of
6 law relating to an incident.

7 (d) FINANCIAL RESPONSIBILITY.—Except as provided
8 under section 302 of this Act, nothing in this Act shall pre-
9 vent a State from imposing or enforcing any requirement re-
10 specting financial responsibility.

11 (e) SOVEREIGN IMMUNITY WAIVER LIMITATION.—
12 The only waiver of the sovereign immunity of the United
13 States Government for oilspill liability is in accordance with
14 this Act.

15 SEC. 110. EFFECTIVE DATE.

16 (a) IN GENERAL.—Except as provided in subsection (b),
17 this title shall take effect six months after the date of enact-
18 ment. There shall be no recovery for natural resources dam-
19 ages under subsection (a) of section 102 of this title where
20 such damages and the discharge of oil from which such dam-
21 ages resulted have occurred wholly before the effective date.
22 Any claims or causes of action in existence under current law
23 as of the date of enactment shall be preserved.

1 (b) PAYMENTS FROM FUND.—Payments under section
2 103(a) may not be made before the effective date specified
3 under section 208 of this Act.

4 SEC. 111. FEDERAL CAUSE OF ACTION BASED ON STATE OR
5 OTHER FEDERAL LAW.

6 In addition to the other causes of action established
7 under this Act and except as precluded by the application of
8 the conventions referred in title III, a civil action for costs
9 and damages may be brought in Federal court in accordance
10 with the substantive law of the place where the injury oc-
11 curred. Such law shall be incorporated into Federal law as
12 the Federal rule of decision. The Act of March 3, 1851 (ch.
13 43, 95 Stat. 635 et seq.), as amended, shall not apply to any
14 such action.

15 TITLE II—CONFORMING AMENDMENTS

16 SEC. 201. TRANS-ALASKA PIPELINE FUND.

17 (a) Section 204(b) of the Trans-Alaska Pipeline Authori-
18 zation Act is amended—

19 (1) in the first sentence, by inserting after “any
20 area” the following: “in the State of Alaska”;

21 (2) in the first sentence, by inserting after “any
22 activities” the following: “related to the trans-Alaska
23 oil pipeline”; and

24 (3) by inserting at the end of the subsection the
25 following new sentence: “This subsection shall not

1 apply to removal costs covered by the Oil Pollution Li-
2 ability and Compensation Act of 1989.”.

3 (b) Subsection (c) of section 204 of the Trans-Alaska
4 Pipeline Authorization Act is repealed. The repeal made by
5 the preceding sentence shall not affect the applicability of
6 that subsection to claims arising before the date of the enact-
7 ment of this Act. The repeal of paragraphs (4), (6), and (8) of
8 that subsection shall only become effective upon the payment
9 by the Board of Trustees of the Trans-Alaska Pipeline Liabil-
10 ity Fund of all valid claims presented to such Fund.

11 (c) Officers and trustees, both present and former, of the
12 Trans-Alaska Pipeline Liability Fund shall not be subject to
13 any liability incurred by that Fund or by the present and past
14 officers and trustees of that Fund, other than liability for
15 gross negligence or willful misconduct.

16 **SEC. 202. INTERVENTION ON THE HIGH SEAS ACT.**

17 Section 17 of the Intervention on the High Seas Act is
18 amended to read as follows:

19 “SEC. 17. The Oilspill Liability Trust Fund shall be
20 available to the Secretary for actions taken under sections 5
21 and 7 of this Act.”.

22 **SEC. 203. FEDERAL WATER POLLUTION CONTROL ACT.**

23 Section 311 of the Federal Water Pollution Control Act
24 is amended as follows:

1 (1) Subparagraph (H) of paragraph (2) of subsec-
2 tion (c) is amended by striking out "from the Fund es-
3 tablished under subsection (k) of this section for the
4 reasonable costs incurred in such removal" and insert-
5 ing in lieu thereof the following: "in the case of any
6 discharges of oil from a vessel or facility, for the rea-
7 sonable costs incurred in such removal from the Oilspill
8 Liability Trust Fund".

9 (2) Subsection (d) is amended by striking out the
10 last sentence.

11 (3) (A) Subsections (f), (g), and (i) of section 311
12 of the Federal Water Pollution Control Act shall not
13 apply with respect to any incident for which liability is
14 established under section 102 of this Act.

15 (B) Paragraphs (2) and (3) of subsection (f) are
16 amended by striking out "under subsection (c) for the
17 removal of such oil or substance by the United States
18 Government" each place it appears and inserting in
19 lieu thereof "under subsection (c) for the removal of
20 such oil or substance by the United States Government
21 and for payments made pursuant to section 103(a)(1) of
22 the Oil Pollution Liability and Compensation Act of
23 1989".

24 (4) Subsection (i) is amended by striking out "(1)"
25 after "(i)" and striking out paragraphs (2) and (3).

1 (5) Subsection (k) is repealed. Any amounts re-
2 maining in the revolving fund established under that
3 subsection shall be deposited in the general fund of the
4 Treasury. The Oilspill Liability Trust Fund shall
5 assume all liability incurred by the revolving fund es-
6 tablished under section 311(k) of the Federal Water
7 Pollution Control Act.

8 (6) Subsection (l) is amended by striking out the
9 second sentence.

10 (7) Subsection (p) is repealed.

11 (8) Section 311 is amended by adding at the end
12 thereof the following new subsection:

13 “(s) The Oilspill Liability Trust Fund shall be available
14 to carry our subsections (c), (d), (i), and (l). Any amounts
15 received by the United States under this section shall be de-
16 posited in the Oilspill Liability Trust Fund.”.

17 SEC. 204. DEEPWATER PORT ACT.

18 The Deepwater Port Act of 1974 is amended as follows:

19 (1) In section 4(c)(1) strike “section 18(1) of this
20 Act;” and insert in lieu thereof “section 107 of the Oil
21 Pollution Liability and Compensation Act of 1989;”;

22 (2) Subsections (b), (d), (e), (f), (g), (h), (i), (j), (l),
23 (n), and paragraphs (1) and (2) of subsection (m) of sec-
24 tion 18 are deleted.

1 (3) Paragraph (3) of subsection (c) of section 18 is
2 amended by striking "Deepwater Port Liability Fund
3 established pursuant to subsection (f) of this section",
4 and inserting in lieu thereof "Oilspill Liability Trust
5 Fund".

6 (4) Subsections (c), (k), and (m) of section 18 are
7 redesignated as subsections (b), (c), and (d) respective-
8 ly, and paragraphs (3) and (4) of subsection (m) are re-
9 designated as paragraphs (1) and (2), respectively.

10 (5) Paragraph (1) of subsection (a) of section 19 is
11 amended by striking the period at the end of the
12 second sentence and inserting in lieu thereof "except
13 that discharges from a deepwater port or from a vessel
14 within a deepwater port safety zone which are subject
15 to the civil penalty provisions of section 18(a)(2) of the
16 Deepwater Port Act of 1974 shall not be subject to
17 the penalty provisions of any other Federal law."

18 (6) Any amounts remaining in the Deepwater
19 Port Liability Fund, established under section 18(f) of
20 the Deepwater Port Act of 1974, shall be deposited in
21 the Fund established under this Act. The Oilspill Li-
22 ability Trust Fund shall assume all liability incurred by
23 the Deepwater Port Liability Fund.

1 SEC. 205. OUTER CONTINENTAL SHELF LANDS ACT AMEND-
2 MENTS.

3 Title III of the Outer Continental Shelf Lands Act
4 Amendment of 1978 is hereby repealed. Any amounts re-
5 maining in the Offshore Oil Pollution Compensation Fund es-
6 tablished under section 302 of that title shall be deposited in
7 the Oilspill Liability Trust Fund. The Oilspill Liability Trust
8 Fund shall assume all liability incurred by the Offshore Oil
9 Pollution Compensation Fund.

10 SEC. 206. ENFORCEMENT OF FEDERAL WATER POLLUTION
11 CONTROL ACT.

12 (a) Section 308 of the Federal Water Pollution Control
13 Act is amended as follows:

14 (1) Subsection (a) is amended by—

15 (A) adding a new clause (4) providing—

16 “(4) obtaining information regarding the
17 identification, nature and quantity of materi-
18 als on a vessel or at a facility,”

19 (B) adding a new clause (5) providing—

20 “(5) obtaining information regarding the
21 source or nature or extent of a discharge or
22 threatened discharge of oil or other pollut-
23 ants from a vessel or a facility,”

24 (C) adding a new clause (6) providing—

1 “(6) obtaining information relating to
2 the ability of a person to pay for or to per-
3 form cleanup or other remedial action,” and,
4 (D) renumbering existing clause (4) as clause

5 (7),

6 (E) in clause (A), inserting “, vessel, or facil-
7 ity” after the words “point source”, and deleting
8 “Administrator” and inserting in lieu thereof “the
9 President”,

10 (F) in clause (B)—

11 (i) replacing subclause (i) with the fol-
12 lowing:

13 “(i) shall have a right of entry to, upon,
14 or through any premises, vessel, or facility in
15 which an effluent source is located or from
16 which there is a discharge or threat of dis-
17 charge of oil or other pollutants into waters
18 of the United States, or in which any records
19 required to be maintained under clause (A) of
20 this subsection are located,”,

21 (ii) in subclause (ii), striking the words
22 “which the owner or operator of such source
23 is required to sample under such clause” and
24 insert in lieu thereof the words “or discharge

1 or threatened discharges of oil or other pol-
2 lutants,”

3 (iii) adding new subclause (iii) providing
4 “(iii) may at reasonable times enter any
5 premises, vessel, or facility where oil or
6 other pollutants are stored to determine the
7 need for response action, to effectuate re-
8 sponse action, or to obtain samples of oil or
9 other pollutants.”, and

10 (iv) deleting the word “Administrator”
11 each time it appears and inserting in lieu
12 thereof the words “the President”,

13 (b) Section 309 of the Federal Water Pollution Control
14 Act is amended as follows:

15 (1) Paragraph (4) of subsection (c) is amended by
16 inserting the words “omits material information or”
17 after the word “knowingly”;

18 (2) by adding the following new paragraph (8) to
19 subsection (c): providing—

20 (A) “In sentencing defendants under this section,
21 the provisions of the Alternative Fines Act, section
22 3571 of title 18, United States Code, should be used
23 whenever possible.”.

24 (3) Subsection (d) is amended by—

1 (A) designating the existing text as para-
2 graph (1) and striking the word "311" therein,

3 (B) adding new paragraphs (2), (3), and (4)
4 providing—

5 "(2) Any person who violates paragraph (3) of
6 subsection (b) of section 311 of this Act, or any regula-
7 tion issued under that paragraph, by the discharge (as
8 defined in section 311 of this Act) of more than five
9 barrels of oil, shall be subject to a civil penalty not to
10 exceed \$25,000 per day for each violation or \$1,000
11 per barrel of oil so discharged, whichever is greater.

12 "(3) Any person who violates paragraph (3) of
13 subsection (b) of section 311 of this Act, or any regula-
14 tion issued under that paragraph, by the discharge (as
15 defined in section 311 of this Act) of any hazardous
16 substance (as defined in section 311 of this Act) in
17 such quantity as may be harmful, as determined pursu-
18 ant to section 311 of this Act shall be subject to a civil
19 penalty not to exceed \$25,000 for each violation. Each
20 discharge of such quantity as may be harmful, or addi-
21 tional fraction thereof, whether continuous or intermit-
22 tent, shall be a separate violation.

23 "(4) In determining the amount of a civil penalty
24 under paragraphs (2) and (3) of this subsection, the
25 court shall consider the seriousness of the violation or

1 violations, the economic benefit (if any) resulting from
2 the violation, any history of such violations, any good-
3 faith efforts to comply with the applicable require-
4 ments, the economic impact of the penalty on the vio-
5 lator, and such other matters as justice may require.”;
6 and

7 (4) Subsection (g) is amended by inserting before
8 the word “318” the word “311,”; and inserting after
9 the words “in a permit issued under section 404 of this
10 Act by a state” the phrase “or regulations issued by
11 the Administrator pursuant to section 311”.

12 (c) Section 311 of the Federal Water Pollution Control
13 Act is amended as follows:

14 (1) Subsection (b) is amended by—

15 (A) in paragraph (5), deleting all after the
16 first sentence and inserting the following in lieu
17 thereof: “Any such person (A) in charge of a
18 vessel from which oil or a hazardous substance is
19 discharged in violation of paragraph (3)(i) of this
20 subsection, or (B) in charge of a vessel from
21 which oil or a hazardous substance is discharged
22 in violation of paragraph (3)(ii) of this subsection
23 and who is otherwise subject to the jurisdiction of
24 the United States at the time of the discharge, or
25 (C) in charge of an onshore facility or an offshore

1 facility, who fails to notify immediately such
2 agency of such discharge shall, upon conviction,
3 be fined in accordance with the applicable provi-
4 sions of title 18 or imprisoned for not more than
5 three years (or not more than five years in the
6 case of a second or subsequent conviction), or
7 both. Notification received pursuant to this para-
8 graph or information that could not have been ob-
9 tained but for the exploitation of such notification
10 shall not be used against any natural person who
11 gives such notification in any criminal case,
12 except a prosecution for perjury or for giving a
13 false statement.”;

14 (B) in subparagraph (A) of paragraph (6),
15 striking the words “\$5,000 for each offense” in
16 each of the first two sentences thereof, and insert-
17 ing in lieu thereof in both instances the words
18 “\$25,000 for each offense, each day such dis-
19 charge continues being a separate offense,”;

20 (C) in subparagraph (B) of paragraph (6),
21 by—

22 (i) deleting the second sentence, and in-
23 serting in lieu thereof the following: “Where
24 the United States can show that such dis-
25 charge was the result of willful negligence or

1 willful misconduct within the privity and
2 knowledge of the owner, operator, or person
3 in charge, such penalty shall be no less than
4 \$100,000.”;

5 (ii) inserting the following sentence at
6 the end of that subparagraph: “Civil penal-
7 ties shall not be assessed under both this
8 clause and section 309(d) for the same dis-
9 charge.”; and

10 (iii) deleting subparagraph (E) of para-
11 graph (6).

12 (2) Subsection (e) is replaced with the following:

13 “(e) INJUNCTIVE RELIEF; ADMINISTRATIVE ORDERS;
14 JUDICIAL REVIEW.—(1) INJUNCTIVE RELIEF.—In addition
15 to any action taken by a State or local government, when the
16 President determines that there may be an imminent and sub-
17 stantial endangerment to the public health or welfare or the
18 environment of the United States, including, but not limited
19 to, fish, shellfish, and wildlife and public and private prop-
20 erty, oceans, navigable waters, contiguous zone, shorelines,
21 estuaries, wetlands, and beaches because of a discharge or
22 threat of a discharge of oil or a hazardous substance in viola-
23 tion of paragraph (3) of subsection (b) of this section from a
24 vessel or facility, the President may require the Attorney
25 General to secure such relief from any person, including but

1 not limited to the owner or operator of such vessel or facility,
2 as may be necessary to abate such endangerment. The dis-
3 trict court of the United States for the district in which the
4 threat occurs shall have jurisdiction to grant such relief as
5 the public interest requires as may be necessary to abate the
6 endangerment.

7 “(2) ADMINISTRATIVE ORDERS.—In the circumstances
8 described in paragraph (1), the President may also, after
9 notice to the affected State, take other action under this sec-
10 tion, including but not limited to, issuing such orders as may
11 be necessary to protect public health and welfare and the
12 environment. Where the recipient of such an order fails,
13 without sufficient cause to obey such order, the President
14 may request the Attorney General to bring an action in the
15 appropriate district court of the United States to enforce such
16 order, to assess a civil penalty of not more than \$25,000 per
17 day of each violation of the order, and to assess three times
18 the costs for damages incurred as a result of the failure or
19 refusal to comply with the order.

20 “(3) JUDICIAL REVIEW.—A determination of the Presi-
21 dent, under paragraph (1) as to the nature and scope of relief
22 sought and an order issued by the President under paragraph
23 (2) shall not be subject to judicial review except in a proceed-
24 ing under this subsection to secure relief or to enforce such
25 order. Judicial review of such orders or determinations shall

1 be limited to the agency administrative record. Otherwise ap-
2 plicable principles of administrative law shall govern whether
3 supplemental materials may be considered by the court. The
4 reviewing court shall uphold the order or determination
5 unless the respondent can demonstrate, on the administrative
6 record, that the order or determination was arbitrary and ca-
7 pricious or otherwise not in accordance with law.”.

8 (3) Subsection (n) is amended by—

9 (A) designating the existing text as para-
10 graph (1), and

11 (B) adding a new paragraph (2) providing:

12 “(2) All decisions taken by the President under
13 paragraph (1) of subsection (c) and subsection (d) of
14 this section are operational discretionary decisions of
15 the President not subject to judicial review. The ade-
16 quacy of removal actions or actions to mitigate damage
17 to the environment selected by the President shall be
18 subject to judicial review only in a proceeding by the
19 Government to recover the costs of such actions under
20 subsection (f) of this section or to obtain injunctive
21 relief or to enforce administrative orders under subsec-
22 tion (e) of this section. In an action to recover the
23 costs of removal or mitigation actions, judicial review
24 of the adequacy of removal actions shall be limited to
25 the agency’s administrative record relating to such ac-

1 tions. Otherwise applicable principles of administrative
2 law shall govern whether any supplemental materials
3 may be considered by the court. The reviewing court
4 shall uphold the action unless the respondent can dem-
5 onstrate, on the administrative record, that the action
6 was arbitrary and capricious or otherwise not in ac-
7 cordance with law.”.

8 (d) Section 502 of the Federal Water Pollution Control
9 Act is amended by the addition of two new paragraphs (20)
10 and (21) providing:

11 “(20) The term ‘oil’ means oil of any kind or in
12 any form, including, but not limited to, petroleum, fuel
13 oil, sludge, oil refuse, and oil mixed with wastes other
14 than dredged spoil.

15 “(21) The term ‘barrel’ means forty-two United
16 States gallons at sixty degrees Fahrenheit.”.

17 (e) Section 509 of the Federal Water Pollution Control
18 Act is amended in paragraph (1) of subsection (a) by striking
19 the words “obtaining information under section 305 of this
20 Act, or carrying out section 507(e) of this Act” and inserting
21 in lieu thereof the words “carrying out this Act”.

22 SEC. 207. TITLE 26, UNITED STATES CODE.

23 (a) Subsection (f) of section 4611 of the Internal Reve-
24 nue Code of 1986 is amended—

1 (1) in paragraph (1) and subparagraph (B) of para-
2 graph (3), by striking the words "January 1, 1992",
3 whenever they appear, and inserting in lieu thereof the
4 words "July 1, 1994";

5 (2) in subparagraph (A) of paragraph (3) by strik-
6 ing the words "December 31, 1991" and inserting in
7 lieu thereof the words "June 30, 1994"; and

8 (3) by striking paragraph (2) and inserting in lieu
9 thereof the following:

10 “(2) COMMENCEMENT DATE.—For purposes of
11 this subsection, the term ‘commencement date’ means
12 the first day of the first calendar month beginning more
13 than thirty days after the passage of the Comprehen-
14 sive Oil Pollution Liability and Compensation Act of
15 1989.”.

16 (b) Subsection (c) of section 9509 of the Internal Reve-
17 nue Code of 1986 is amended by striking the text of para-
18 graphs (1) and (2) and inserting in lieu thereof the following:

19 “(1) GENERAL EXPENDITURE PURPOSES.—
20 Amounts in the Oilspill Liability Trust Fund shall be
21 available, as provided in appropriations Acts, only for
22 purposes of making expenditures authorized under the
23 Comprehensive Oil Pollution Liability and Compensa-
24 tion Act of 1989.

25 “(2) LIMITATIONS ON EXPENDITURES.—

1 “(A) \$500,000,000 PER INCIDENT.—The
2 maximum amount which may be paid from the
3 Oilspill Liability Trust Fund with respect to any
4 single incident, in combination with payment, if
5 any, under the International Convention on the
6 Establishment of an International Fund for Com-
7 pensation for Oil Pollution Damage, 1984, shall
8 be \$500,000,000. Notwithstanding any other pro-
9 vision of law, the President is authorized to waive
10 the limit imposed by this subparagraph and to
11 prescribe a higher limit upon a determination that
12 it is necessary and in the best interests of the
13 country.

14 “(B) \$30,000,000 MINIMUM BALANCE.—
15 Except in the case of removal costs as defined in
16 the Comprehensive Oil Pollution Liability and
17 Compensation Act of 1989, a payment may be
18 made from such Fund only if the amount in such
19 Fund after such payment will not be less than
20 \$30,000,000.”.

21 SEC. 208. EFFECTIVE DATE.

22 Sections 201, 202, 203, 204, and 205 shall be effective
23 on the later of (1) the commencement date (as that term is
24 defined in section 4611(f)(2) of the Internal Revenue Code of
25 1986), or (2) the effective date of the first Appropriation Act

1 enacted for the purposes of section 9509(c)(1) of the Internal
2 Revenue Code of 1986.

3 **TITLE III—IMPLEMENTATION OF**
4 **INTERNATIONAL CONVENTIONS**

5 **SEC. 301. DEFINITIONS.**

6 For the purposes of this title—

7 (1) the term “Civil Liability Convention” means
8 the International Convention on Civil Liability for Oil
9 Pollution Damage, 1984;

10 (2) the terms “ship”, “owner”, “oil”, “pollution
11 damage”, and “incident” shall have the meanings pro-
12 vided in article I of the Civil Liability Convention;

13 (3) the term “financial responsibility” has the
14 same meaning as “financial security” under the Civil
15 Liability Convention;

16 (4) the term “Fund Convention” means the Inter-
17 national Convention on the Establishment of an Inter-
18 national Fund for Compensation for Oil Pollution
19 Damage, 1984; and

20 (5) the term “International Fund” means the
21 International Oil Pollution Compensation Fund, estab-
22 lished under article 2 of the Fund Convention.

23 **SEC. 302. APPLICABILITY OF CONVENTIONS.**

24 During any period in which the Civil Liability Conven-
25 tion and the Fund Convention are in force with respect to the

1 United States, liability and financial responsibility relating to
2 pollution damage arising from an incident involving a ship
3 shall be determined in accordance with the Civil Liability
4 Convention and Fund Convention. During such a period, no
5 claim for such pollution damage may be made in contraven-
6 tion of those conventions under any law. Furthermore, during
7 such a period, except as provided under section 307, no re-
8 quirement concerning financial responsibility respecting pol-
9 lution damage may be imposed or enforced. Nothing in this
10 title shall constitute a ratification of either the Civil Liability
11 Convention or the Fund Convention.

12 **SEC. 303. RECOGNITION OF INTERNATIONAL FUND.**

13 The International Fund is recognized under the laws of
14 the United States as a legal person, and shall have the capac-
15 ity to acquire and dispose of real and personal property, and
16 to institute and be party to legal proceedings. The Director of
17 the International Fund is recognized as the legal representa-
18 tive of the International Fund. The Director shall be deemed
19 to have appointed irrevocably the Secretary of State as the
20 International Fund's agent for the service of process in any
21 legal proceedings involving the International Fund within the
22 United States. The International Fund and its assets shall be
23 exempt from all direct taxation and payment of any customs
24 duties in the United States.

1 SEC. 304. ACTION IN UNITED STATES COURTS.

2 (a) SERVICE OF PROCESS ON FUND.—In any action
3 brought in a court in the United States against the owner of
4 a ship or its guarantor under the Civil Liability Convention,
5 the plaintiff or defendant, as the case may be, shall serve a
6 copy of the complaint and any subsequent pleading therein
7 upon the International Fund at the same time the complaint
8 or other pleading is served upon the opposing parties.

9 (b) INTERVENTION.—The International Fund may in-
10 tervene as a party as a matter of right in any action brought
11 in a court in the United States against the owner of a ship or
12 its guarantor under the Civil Liability Convention.

13 SEC. 305. CONTRIBUTION TO INTERNATIONAL FUND.

14 (a) PAYMENTS TO BE MADE FROM OILSPILL LIABIL-
15 ITY TRUST FUND.—The amount of any contribution to the
16 International Fund which is required to be made under arti-
17 cle 10 of the Fund Convention by any person with respect to
18 oil received in any port, terminal installation, or other instal-
19 lation located in the United States shall be paid to the Inter-
20 national Fund from the Oilspill Liability Trust Fund estab-
21 lished by section 9509 of the Internal Revenue Code of
22 1986.

23 (b) INFORMATION.—The Secretary may, by regulation,
24 require persons who are required to make contributions with
25 respect to oil received in any port, terminal, installation, or
26 other installations in the United States under article 10 of the

1 Fund Convention to provide all information relating to that
2 oil as may be necessary to carry out subsection (a) of this
3 section, articles 10, 12, 13, 14, and 15 of the Fund Conven-
4 tion, and article 29 of the Protocol of 1984 to Amend the
5 International Convention on the Establishment of an Interna-
6 tional Fund for Compensation for Oil Pollution Damage,
7 1971.

8 **SEC. 306. RECOGNITION OF FOREIGN JUDGMENTS.**

9 Any final judgment of a court of any country which is a
10 party to the Civil Liability Convention or to the Fund Con-
11 vention in an action for compensation under either conven-
12 tion shall be recognized by any court of the United States
13 having jurisdiction under this Act, when that judgment has
14 become enforceable in that country and is no longer subject
15 to ordinary form of review, except where—

- 16 (1) the judgment was obtained by fraud, or
17 (2) the defendant was not given reasonable notice
18 and a fair opportunity to present its case.

19 **SEC. 307. FINANCIAL RESPONSIBILITY.**

20 (a) **UNITED STATES DOCUMENTED SHIPS.**—The
21 owner of each ship which is documented under the laws of
22 the United States which is subject to the Civil Liability Con-
23 vention shall establish and maintain in accordance with regu-
24 lations promulgated by the Secretary evidence of financial

1 responsibility as required in article VII of the Civil Liability
2 Convention.

3 (b) OTHER SHIPS.—The owner of each ship (other than
4 a ship to which subsection (a) applies or a ship which is a
5 public vessel), which is subject to the Civil Liability Conven-
6 tion and which enters or leaves a port or terminal in the
7 United States or uses an Outer Continental Shelf facility or
8 an offshore facility that is or was licensed under the Deepwa-
9 ter Port Act of 1974, shall establish and maintain, in accord-
10 ance with regulations promulgated by the Secretary, evi-
11 dence of financial responsibility as required in article VII of
12 the Civil Liability Convention. Any ship which has on board
13 a valid certificate issued in accordance with article VII of the
14 Civil Liability Convention shall be considered as having met
15 the requirements of this subsection. Any ship carrying only
16 oil as cargo, fuel, or residue, which has on board a valid
17 certificate issued in accordance with article VII of the Civil
18 Liability Convention shall be considered as having met the
19 requirements of section 104 of this Act.

20 (c) AUTHORITY OF SECRETARY TO ISSUE.—The Sec-
21 retary is authorized to issue any certificate of financial re-
22 sponsibility which the United States may issue under the
23 Civil Liability Convention.

24 (d) WITHHOLDING CLEARANCE.—The Secretary of the
25 Treasury shall withhold or revoke the clearance required by

1 section 4197 of the Revised Statutes of the United States of
2 any ship which does not have a certificate demonstrating
3 compliance with this section.

4 (e) DENYING ENTRY AND DETAINING VESSELS.—The
5 Secretary of the department in which the Coast Guard is
6 operating may (1) deny entry to any facility or to any port or
7 place in the United States, or (2) detain at the facility or port
8 or place in the United States, any ship subject to this section
9 which, upon request, does not produce the certificate demon-
10 strating compliance with this section or regulations issued
11 hereunder.

12 (f) CIVIL PENALTY.—Any person who, after notice and
13 an opportunity for a hearing, is found to have violated this
14 section, any regulation issued under this section, section
15 305(b), or section 308, or any denial or detention order
16 issued under subsection (e) of this section shall be liable to
17 the United States for a civil penalty, not to exceed \$25,000
18 per day of violation. The amount of the civil penalty shall be
19 assessed by the Secretary in accordance with the procedures
20 set forth in section 107 of this Act.

21 (g) WAIVER OF SOVEREIGN IMMUNITY.—The United
22 States waives all defenses based on its status as a sovereign
23 State with respect to any controversy arising under the Civil
24 Liability Convention or the Fund Convention relating to any

1 ship owned by the United States and used for commercial
2 purposes.

3 SEC. 308. REGULATIONS.

4 The Secretary may prescribe the necessary regulations
5 to carry out this Act and all obligations of the United States
6 under the Civil Liability Convention and the Fund
7 Convention.

○

101ST CONGRESS
1ST SESSION

S. 1223

To amend the Clean Water Act, to strengthen and expand liability for cleanup costs, damages, and penalties resulting from oil spills and to expand enforcement authority.

IN THE SENATE OF THE UNITED STATES

JUNE 22, (legislative day, JANUARY 3), 1989

Mr. LIEBERMAN (for himself, Mr. CHAFEE, Mr. REID, Mr. DURENBERGER, and Mr. CRANSTON) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Clean Water Act, to strengthen and expand liability for cleanup costs, damages, and penalties resulting from oil spills and to expand enforcement authority.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. This Act may be cited as the "Oil Spill
4 Cleanup and Enforcement Act of 1989".

5 SEC. 2. Subsection (a) of section 311 of the Clean
6 Water Act (33 U.S.C. 1321(a)) is amended as follows:

7 (1) paragraph (1) is amended to read as follows:

8 "(1) 'oil' means petroleum, including crude oil or
9 any fraction or residue therefrom;"

1 (2) paragraph (2) is amended to read as follows:

2 “(2) ‘discharge’ means any emission, intentional
3 or unintentional, into the environment, and includes,
4 but is not limited to, spilling, leaking, pumping, pour-
5 ing, emitting, emptying, or dumping;”;

6 (3) paragraph (3) is amended by inserting immedi-
7 ately before the semicolon at the end thereof a comma
8 and the following: “and inland oil barges”;

9 (4) paragraph (12) is amended to read as follows:

10 “(12) ‘act of God’ means an unanticipated grave
11 natural disaster or other natural phenomenon of an ex-
12 ceptional, inevitable, and irresistible character the ef-
13 fects of which could not have been prevented or avoid-
14 ed by the exercise of due care or foresight;”;

15 (5) at the end of paragraph (17), strike out the
16 period and insert a semicolon and the word “and”;

17 (6) immediately after paragraph (17), add the
18 following:

19 “(18) ‘damages’ means damages for economic loss
20 or the loss of or injury to natural resources as specified
21 in section 311(f) of this Act;

22 “(19) ‘environment’ means the navigable waters,
23 the waters of the contiguous zone, the ocean waters of
24 which the natural resources are under the exclusive
25 management authority of the United States under the

1 Magnuson Fishery Conservation and Management Act,
2 adjoining shorelines, and the ambient air above such
3 waters and shorelines;

4 “(20) ‘natural resource’ includes land, fish, wild-
5 life, biota, air, water, ground water, drinking water
6 supplies, and other such resources belonging to, man-
7 aged by, held in trust by, appertaining to, or otherwise
8 controlled by the United States (including the resources
9 of the fishery conservation zone established by the
10 Magnuson Fishery Conservation and Management Act),
11 or any State; and

12 “(21) ‘removal costs’ means the actual costs of re-
13 moval taken after a discharge of oil has occurred or,
14 where there was a substantial threat of a discharge of
15 oil, the costs and action taken to prevent, minimize, or
16 mitigate oil pollution from that incident, including all
17 costs of completing removal.”.

18 SEC. 3. (a) Section 311(e) of the Clean Water Act (33
19 U.S.C. 1321(e)) is amended to read as follows:

20 “(e) ABATEMENT ACTIONS.—

21 “(1) MAINTENANCE, JURISDICTION, ETC.—In ad-
22 dition to any other action taken by a State or local
23 government, when the President determines there may
24 be an imminent and substantial threat to the public
25 health or welfare or environment of the United States,

1 including, but not limited to, fish, shellfish, and wildlife
2 and public and private property, shorelines, estuaries,
3 oceans, navigable waters, wetlands, and beaches, be-
4 cause of any actual or threatened discharge of oil or
5 hazardous substance from an onshore or offshore facili-
6 ty or vessel, the President may require the Attorney
7 General of the United States to secure such relief from
8 any person, including but not limited to any responsible
9 party as defined in subsection (f), as may be necessary
10 to abate such endangerment. The district court of the
11 United States in which the threat occurs shall have ju-
12 risdiction to grant such relief as the public interest and
13 the equities of the case may require. The President
14 may also, after notice to the affected State, take other
15 action under this section including, but not limited to,
16 issuing such orders as may be necessary to protect
17 public health or welfare or the environment.

18 “(2) FINES.—Any person who, without sufficient
19 cause, fails to comply with any order of the President
20 under paragraph (1) may, in an action brought in the
21 appropriate United States district court to enforce such
22 order, be fined not more than \$25,000 per day of each
23 violation of the order.

24 “(3) JUDICIAL REVIEW.—A determination of the
25 President, under paragraph (1) as to the nature and

1 scope of relief sought and an order issued by the Presi-
2 dent under paragraph (1) shall not be subject to judicial
3 review except in a proceeding under this subsection to
4 secure relief or to enforce such order. Judicial review
5 of such orders or determinations shall be limited to the
6 agency administrative record. Otherwise applicable
7 principles of administrative law shall govern whether
8 supplemental materials may be considered by the court.
9 The reviewing court shall uphold the order or determi-
10 nation unless the respondent can demonstrate, on the
11 administrative record, that the order or determination
12 was arbitrary and capricious or otherwise not in ac-
13 cordance with law.

14 “(4) REIMBURSEMENT.—(A) Any person who re-
15 ceives and complies with the terms of any order issued
16 under paragraph (1) may, within 60 days after comple-
17 tion of the required action, petition the President for
18 reimbursement from the Fund established under this
19 section for the reasonable costs of such action, plus in-
20 terest. Any interest payable under this subparagraph
21 shall accrue on the amounts expended from the date of
22 expenditure at the same rate as specified for interest
23 on investments of the Fund.

24 “(B) If the President refuses to grant all or part
25 of a petition made under this paragraph, the petitioner

1 may within 30 days of receipt of such refusal file an
2 action against the President in the appropriate United
3 States district court seeking reimbursement from the
4 Fund established under this section.

5 “(C) Except as provided in clause (D), to obtain
6 reimbursement, the petitioner shall establish by a pre-
7 ponderance of the evidence that it is not liable for re-
8 sponse costs under subsection (f) of this section and
9 that costs for which it seeks reimbursement are reason-
10 able in light of the action required by the relevant
11 order.

12 “(D) A petitioner who is liable for response costs
13 under subsection (f) of this section may also recover its
14 reasonable costs of response to the extent that it can
15 demonstrate, on the administrative record, that the
16 President’s decision in selecting the removal action or-
17 dered was arbitrary and capricious or was otherwise
18 not in accordance with law. Reimbursement awarded
19 under this subparagraph shall include all reasonable re-
20 moval costs incurred by the petitioner pursuant to the
21 portions of the order found to be arbitrary and capri-
22 cious or otherwise not in accordance with law.

23 “(E) Reimbursement awarded by a court under
24 clause (C) or (D) may include appropriate costs, fees,

1 and other expenses in accordance with subsections (a)
2 and (d) of section 2412 of title 28, United States Code.

3 “(5) TREBLE DAMAGES.—If any person who is
4 liable for a discharge or threat of discharge of oil or a
5 hazardous substance from a vessel or onshore or off-
6 shore facility fails without sufficient cause to properly
7 provide removal action upon order of the President
8 pursuant to this Act, such person may be liable to the
9 United States for punitive damages in an amount at
10 least equal to three times the amount of any costs in-
11 curred by the Fund as a result of such failure to take
12 proper action. The President is authorized to com-
13 mence a civil action against any such person to recover
14 the punitive damages. Any moneys received by the
15 United States pursuant to this subsection shall be de-
16 posited in the Fund.”.

17 (b)(1) Subparagraphs (A) and (B) of paragraph (6) of
18 subsection (b) of section 311 of the Clean Water Act (33
19 U.S.C. 1321(b)(6) (A) and (B)) are amended to read as fol-
20 lows:

21 “(A) Any person who violates paragraph (3) (i) or
22 (ii) of this subsection shall be subject to a civil penalty
23 in an amount up to \$25,000 per day for each violation
24 or \$1,000 per barrel of oil or hazardous substances dis-
25 charged in violation of paragraph (3) of this subsection,

1 whichever is greater. Each discharge of oil or hazard
2 ous substance (or any fraction thereof) in excess of the
3 quantity determined by the President under paragraph
4 (3) to be harmful to the public health or welfare or the
5 environment shall constitute a separate violation. Each
6 day shall constitute a separate day of violation until
7 the President determines that the removal of the oil or
8 hazardous substance is complete. In determining the
9 amount of the civil penalty under this paragraph and
10 paragraph (4), the court shall consider the seriousness
11 of the violation or violations, the economic benefit to
12 the violator, if any, resulting from the violation, any
13 history of prior violations, the nature, extent, and
14 degree of success of any efforts to minimize or mitigate
15 the effects of such discharge, the economic impact of
16 the penalty on the violator, and any other matters as
17 justice may require. Where the United States can show
18 that such discharge was the result of willful negli-
19 gence, willful misconduct or a violation of applicable
20 safety, construction, or operating regulations, such pen-
21 alty shall be no less than \$250,000.00.

22 “(B) The Secretary of the Department in which
23 the Coast Guard is operating or the Administrator of
24 the Environmental Protection Agency may request the
25 Attorney General to commence a civil action to recov-

1 er civil penalties against any person in the district
2 court in the district in which such person is located,
3 resides, or is doing business, and any such court shall
4 have jurisdiction to assess such civil penalty.”.

5 (2) Subparagraph (E) of paragraph (6) of subsection (b)
6 of section 311 of the Clean Water Act (33 U.S.C.
7 1321(b)(6)(E)) is repealed.

8 (3) Paragraph (5) of subsection (b) of section 311 of the
9 Clean Water Act (33 U.S.C. 1321(b)(5)) is amended by in-
10 serting immediately prior to the last sentence thereof the fol-
11 lowing new sentence: “In addition, any such person who
12 knowingly fails to provide the notice required by this subsec-
13 tion shall not be entitled to any of the defenses to liability set
14 out in subsection (f) of this section”.

15 (4) Paragraph (4) of subsection (b) of section 311 of the
16 Clean Water Act (33 U.S.C. 1321(b)(4)) is amended by in-
17 serting immediately after “public health or welfare” the fol-
18 lowing: “or the environment”.

19 (c) Paragraph (1) of subsection (c) of section 311 of the
20 Clean Water Act (33 U.S.C. 1321(c)(1)) is amended by delet-
21 ing that part of such paragraph following “Magnuson Fishery
22 Conservation and Management Act” and inserting in lieu
23 thereof the following: “the President shall remove or arrange
24 for the removal of such oil or substance. The President is not
25 required to act to remove or arrange for removal of such oil

1 or substance if the President determines that such removal
2 will be done properly and promptly by the owner or operator
3 of the vessel, onshore facility, or offshore facility from which
4 the discharge occurs, or by any other responsible party or by
5 any other entity intended to be selected by such owner or
6 operator or other responsible party to carry out the removal
7 of such oil or substance. In making such determination, the
8 President shall consider whether such owner or operator or
9 other party has the financial and technical capability neces-
10 sary to effectively remove the oil or hazardous substance. A
11 decision of the President under this subsection is not subject
12 to judicial review.”.

13 (d) Subsection (f) of section 311 of the Clean Water Act
14 (33 U.S.C. 1321(f)) is amended to read as follows:

15 “Liability for actual costs of removal

16 “(f)(1) Notwithstanding any other provision or rule of
17 law, and subject only to the exclusive affirmative defenses set
18 forth in paragraph (2) of this subsection, whenever there is a
19 release or threatened release of oil which causes the incur-
20 rence of response costs, each responsible party shall be strict-
21 ly, and jointly and severally, liable for—

22 “(A)(i) all removal costs actually incurred by the
23 United States Government or a State, including all in-
24 ternal agency costs necessitated by the incident; and

1 “(ii) any removal costs incurred by any other
2 person, consistent with the National Contingency Plan;
3 and

4 “(B) all damages for economic loss or loss of
5 natural resources resulting from such a discharge,
6 including—

7 “(i) any injury to, destruction of, or loss of
8 any real or personal property;

9 “(ii) any loss of use of real or personal
10 property;

11 “(iii) any injury to, destruction of, or loss of
12 natural resources, including the costs of assessing
13 such injury, destruction, or loss;

14 “(iv) any loss of use, including loss of sub-
15 sistence use, of any natural resources, without
16 regard to the ownership or management of such
17 resources;

18 “(v) any loss of income or profits or impair-
19 ment of earning capacity resulting from injury to
20 or destruction of real or personal property or nat-
21 ural resources, without regard to the ownership of
22 such property or resources; and

23 “(vi) any direct or indirect loss of tax, royal-
24 ty, rental, or net profits share revenue by the
25 Federal Government or any State or political sub-

1 division thereof, for a period of not to exceed one
2 year.

3 “(2)(A) There shall be no liability under paragraph (1) of
4 this subsection for a person otherwise liable who can estab-
5 lish by a preponderance of the evidence that the discharge or
6 threat of discharge of oil and the damages resulting therefrom
7 were caused solely by—

8 “(i) an act of God;

9 “(ii) an act of war;

10 “(iii) an act or omission of a third party other
11 than an employee or agent of the defendant, or other
12 than one whose act or omission occurs in connection
13 with a contractual relationship, existing directly or in-
14 directly, with the responsible party, if the responsible
15 party establishes by a preponderance of the evidence
16 that (I) he exercised due care with respect to the oil or
17 hazardous substance concerned, taking into consider-
18 ation the characteristics of such oil or substance, in
19 light of all relevant facts and circumstances, and (II)
20 he took precautions against foreseeable acts or omis-
21 sions of any such third party and the consequences that
22 could foreseeably result from such acts or omissions; or

23 “(iv) any combination of the foregoing paragraphs.

24 “(B) In any case where a responsible party can establish
25 by a preponderance of the evidence that a discharge and the

1 damages resulting therefrom were caused solely by an act or
2 omission of a third party (or solely by such an act or omission
3 in combination with an act of God or an act of war) in ac-
4 cordance with subsection (f)(2)(A)(iii), such third party shall
5 be liable under this section as if such third party were the
6 responsible party.

7 “(3) For purposes of this subsection, the term ‘responsi-
8 ble party’ includes—

9 “(A) any person who owns or operates an onshore
10 facility, offshore facility, or vessel at the time of a dis-
11 charge or threatened discharge of oil from the onshore
12 facility, offshore facility, or vessel;

13 “(B) any person who owns or operates an onshore
14 facility, offshore facility, or vessel at the time any re-
15 moval cost is incurred in connection with a discharge
16 or threatened discharge of oil from the onshore facility,
17 offshore facility, or vessel;

18 “(C) any person who owns or operates an onshore
19 facility, offshore facility, or vessel at the time any suit
20 is filed under this section in connection with a dis-
21 charge or threatened discharge of oil from the onshore
22 facility, offshore facility, or vessel;

23 “(D) in the case of a discharge or threatened dis-
24 charge from an abandoned onshore facility, offshore fa-
25 cility, or vessel, any person who owned or operated the

1 onshore facility, offshore facility, or vessel immediately
2 prior to his abandonment;

3 “(E) any person who owns, or owns any interest
4 in, the oil that has been, is being, or may be dis-
5 charged;

6 “(F) any person who by contract, agreement, or
7 otherwise arranged for the handling, storage, treat-
8 ment, transport, or disposal of the oil by another party
9 or entity, if the discharge or threatened discharge
10 occurs while the oil is in the possession, or under the
11 control, of the other party or entity; and

12 “(G) any person who accepts or accepted the oil
13 for handling, storage, treatment, transport, or disposal
14 if the discharge or threatened discharge occurs while
15 the oil is in the possession, or under the control, of
16 such person.

17 “(4) In the case of an injury to, destruction of, or loss of
18 natural resources under subsection (f)(1)(B) of this section,
19 liability shall be (A) to the United States Government for
20 natural resources belonging to, managed by, controlled by, or
21 appertaining to the United States, and (B) to any State for
22 natural resources within the State or belonging to, managed
23 by, controlled by, or appertaining to such State. The Presi-
24 dent, or the authorized representative of any State, shall act
25 on behalf of the public as trustee of such natural resources to

1 recover for such damages. Sums recovered by the United
2 States Government as trustee under this subsection shall be
3 retained by the trustee, without further appropriation, for use
4 only to restore, replace, or acquire the equivalent of such
5 natural resources. Sums recovered by a State as trustee
6 under this subsection shall be available for use only to re-
7 store, replace, or acquire the equivalent of such natural re-
8 sources by the State. The measure of damages in any action
9 under subsection (f)(1)(B) shall not be limited by the sums
10 which can be used to restore or replace such resources.
11 There shall be no double recovery under this Act for natural
12 resource damages, including the costs of damage assessment
13 or restoration, rehabilitation, or acquisition for the same dis-
14 charge and natural resource.

15 “(5) No indemnification, hold harmless, or similar agree-
16 ment or conveyance shall be effective to transfer the liability
17 imposed by this section from any responsible party to any
18 other person. Nothing in this subsection shall bar any agree-
19 ment to insure, hold harmless, or indemnify a party to such
20 agreement for any liability under this section.

21 “(6) Any person may seek contribution from any other
22 responsible party or potentially responsible party during or
23 following any action under this section. Such claim shall be
24 brought in accordance with this section and the Federal
25 Rules of Civil Procedure. Nothing in this subsection shall

1 diminish the right of any person to bring an action for contri-
2 bution in the absence of a civil action under this section.

3 “(7) Nothing in this subsection shall bar a cause of
4 action that any responsible party subject to liability under
5 this section has, by reason of subrogation or otherwise
6 against any person.”.

7 (e) Subsections (g), (h), and (i) of section 311 of the
8 Clean Water Act (33 U.S.C. 1321(g), (h), and (i)) are
9 repealed.

10 SEC. 4. (a) Subsection (c) of section 309 of the Clean
11 Water Act (33 U.S.C. 1319(c)) is amended by inserting im-
12 mediately after “308,” each time it appears therein the fol-
13 lowing: “311,”.

14 (b) Paragraph (1) of subsection (g) of section 309 of the
15 Clean Water Act (33 U.S.C. 1319(g)(1)) is amended to read
16 as follows:

17 “(g) ADMINISTRATIVE PENALTIES.—

18 “(1) VIOLATIONS.—Whenever on the basis of any
19 information available—

20 “(A) the Administrator or the Secretary of
21 the Department in which the Coast Guard is op-
22 erating finds that any person has violated section
23 301, 302, 306, 307, 308, 311, 318, or 405 of
24 this Act, or has violated any permit condition or
25 limitation implementing any of such sections in a

1 permit issued under section 402 of this Act by the
2 Administrator or by a State, or in a permit issued
3 under section 404 by a State, or

4 “(B) the Secretary of the Army (hereinafter
5 in this subsection referred to as the ‘Secretary’)
6 finds that any person who has violated any permit
7 condition or limitation in a permit issued under
8 section 404 of this Act by the Secretary of the
9 Army,

10 the Administrator, the Secretary of the Department in which
11 the Coast Guard is operating, or the Secretary of the Army,
12 as the case may be, may, after consultation with the State in
13 which the violation occurs, assess a Class I civil penalty or a
14 Class II civil penalty under this subsection.”.

15 (c) Subparagraph (A) of paragraph (6) of subsection (g)
16 of section 309 of the Clean Water Act (33 U.S.C.
17 1319(g)(6)(A)) is amended by inserting a comma immediately
18 before the period at the end thereof, and the following:
19 “except that any judicial or administrative action by a State
20 under State law shall not affect or limit the authority of the
21 Administrator or the Secretary of the Department under
22 which the Coast Guard is operating with respect to dis-
23 charges of oil or hazardous substances under subsection (d) of
24 this section or section 311 of this Act”.

○